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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 435

BOWMAN DAIRY COMPANY, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA AND
WILLIS L. HOTCHKISS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE PETITIONERS.

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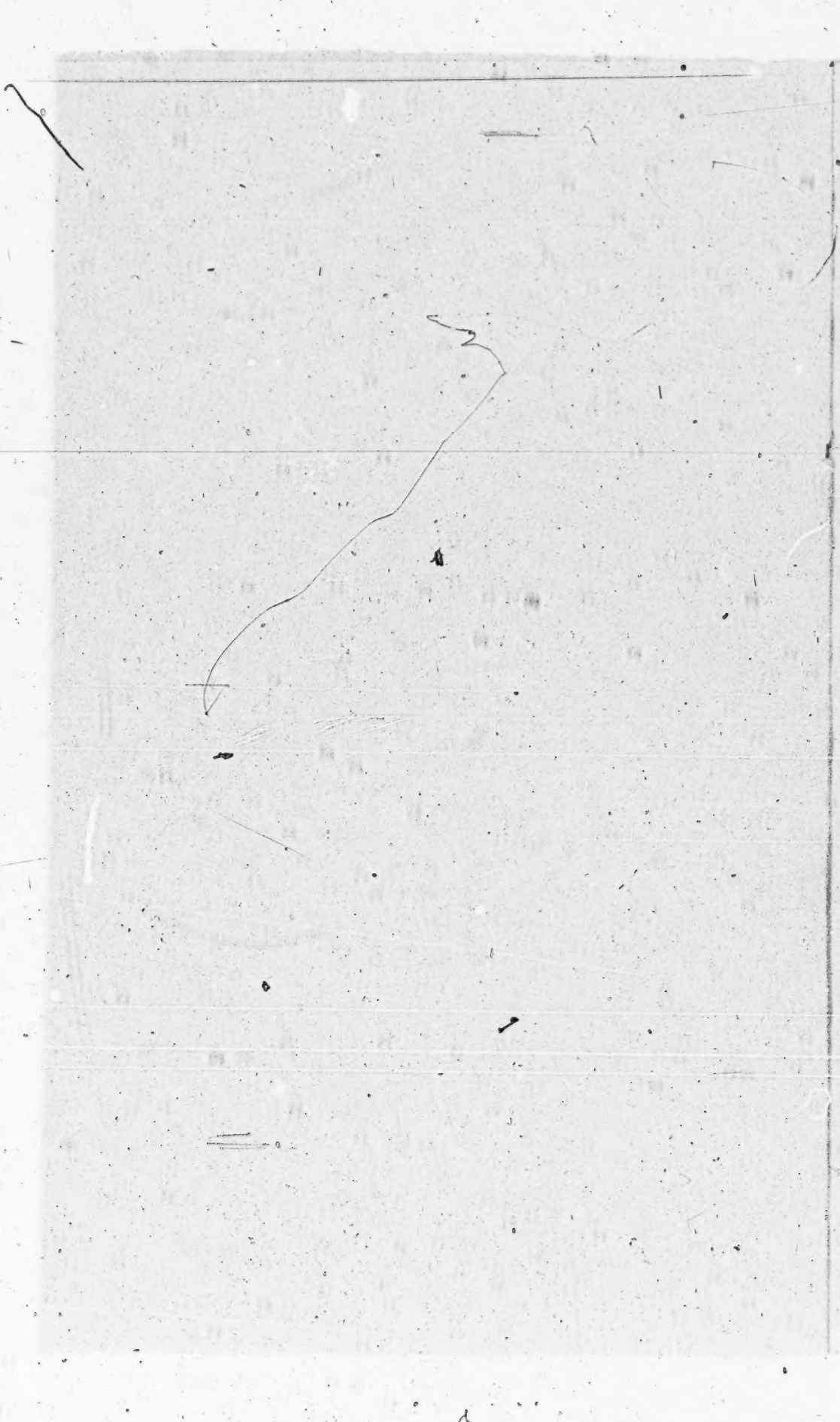

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2 Bishop, New Criminal Procedure (2d ed. 1913) p. 771 52

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Dession, "The Trial of Economic and Technological Issues of Fact: I and II" (1949), 58 Yale L. Rev. 1019 and 1242 24

Federal Rules of Criminal Procedure, Preliminary Draft (1934) 26, 35, 49

Federal Rules of Criminal Procedure, Second Preliminary Draft (1944) 26, 34, 35, 49

Freed, "The Rules of Criminal Procedure: an Appraisal Based on a Year's Experience (1947), 33 American Bar Ass'n Journal 1010..... 23

McAllister, "The Big Case: Procedural Problems in Anti-Trust Litigation" (1950), 64 Harv. L. Rev. 27..24, 63

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6 Wigmore on Evidence (3rd ed. 1940), §§ 1845, 1850, 1859, 1859g and 1863.....19, 51, 52, 54, 63

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OPINIONS BELOW

The majority, concurring and dissenting opinions (R. 128-139) of the Court of Appeals are reported at 185 F. 2d 159.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1950 (R. 140). The petition for a writ of certiorari was filed on December 6, 1950, and was granted on January 15, 1951 (R. 146). The jurisdiction of this Court rests upon 28 U. S. C. Section 1254(1).

QUESTION PRESENTED

Whether the district court had discretion, in a criminal case, to permit any pre-trial inspection of documents in the control of an attorney for the Government, except as permitted under Rule 16.

RULES INVOLVED

Rule 17(c) of the Federal Rules of Criminal Procedure provides as follows:

> "For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

Rule 16 provides as follows:

> "Discovery and Inspection. Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his de-

fense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."

Rule 2 provides as follows:

"Purpose and Construction. These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

STATEMENT

The indictment in this case charges eight corporations and nine corporate officers with a conspiracy in violation of Section 1 of the Sherman Act (R. 3-9).[1] Motions by the petitioners, defendants in the district court, to dismiss the indictment (R. 115-116) were based in part upon the vagueness and indefiniteness of the charge therein laid. These motions were denied on April 13, 1949 (R. 117). Thereafter, on June 13, 1949, each petitioner filed three motions[2] (R. 117):

1. A motion under Rule 17(c) of the Federal Rules of Criminal Procedure for a subpoena *duces tecum* requiring the Government to produce prior to the trial, for petitioners' inspection, certain documents obtained by the Government by means other than seizure or process and not obtained from or belonging to petitioners (R. 10-27);

2. A motion under Rule 16 for an order directing the Government to produce for inspection certain other documents which the Government had obtained by seizure or process (R. 28-46);[3]

3. A motion for a bill of particulars (R. 117).

The district court granted parts of each petitioner's first two motions and denied the motions for a bill of particulars except in two minor respects (R. 64, 69-70, 75).

The motions for a subpoena *duces tecum* under Rule 17(c) described fully the issues to which the desired documents related (R. 10-27). They were served on Government coun-

1. The indictment was returned on July 30, 1948, by a grand jury sitting in the Northern District of Illinois, Eastern Division (R. 2).

2. The petitioners also filed a motion to strike surplusage from the indictment (R. 117); this motion was granted (R. 75).

3. The Government vigorously resisted this motion both by a brief and by oral argument at the October 24, 1949, hearing thereon (R. 119). The statement in Judge Duffy's opinion (R. 128-129) that "the Government did not object to the motion under Rule 16" is incorrect.

sel and presented to the district court before the subpoena was issued (R. 117, 48-49). At a hearing on October 24, 1949 (R. 119), with Government counsel participating, the court directed the petitioners to limit the scope of the proposed subpoena (see parenthetical exceptions and limiting clauses set off by (a) and (b) and (a), (b) and (c) in quotation from subpoena, *infra*). The motions for a subpoena were then granted orally from the bench on that day (R. 119). The subpoena *duces tecum* was addressed to respondent Willis L. Hotchkiss, Special Assistant to the Attorney General, and was served on November 1, 1949 (R. 48-50). On November 7, 1949, after a hearing to settle the order to comply with the subpoena (R. 51-63), the district court entered an order (R. 69-71) directing respondent Hotchkiss, pursuant to Rule 17(c), to produce for petitioners' inspection the books, papers and documents designated in the subpoena. A copy of the subpoena was attached to the district court's order. It directed production of (R. 71):

> "* * * all documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel, in any manner other than by seizure or process, (a) in the course of the investigation by Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects (a) have been presented to the Grand Jury; or (b) are to be offered as evidence on the trial of the defendants, or any of them, under said indictment; or (c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants."

The Government subsequently moved to quash the subpoena and to set aside the order of November 7, 1949, which directed compliance therewith (R. 72-73). The grounds for the motion were: (a) under Rule 17(c) of the Federal Rules of Criminal Procedure, a subpoena for the production of documents may not issue against an attorney for the Government; (b) the district court had no jurisdiction to order the attorneys for the Government to produce, for inspection by defendants, documents and other papers designated in a subpoena issued under Rule 17(c); and (c) the right of defendants in criminal proceedings to obtain access to documents and other papers in the custody of an "Attorney for the Government", as defined by Rule 54(c) of the Federal Rules of Criminal Procedure, is limited to the rights granted by Rule 16 of said Rules (R. 72-73). The Government did not challenge the form or scope, or the timeliness of the subpoena (R. 61, 62, 72-73, 74, 103-104).

On January 4, 1950, the district court denied the Government's motion to quash (R. 83-84). Respondent Hotchkiss thereupon submitted to the district court an affidavit, which averred that all of the documents which the district court had ordered produced were in his custody (R. 84-85). The statement reiterated the Government's contention that the district court had no jurisdiction under Rule 17(c) to enter a pre-trial inspection order against an attorney for the Government, and set forth that the respondent Hotchkiss, acting on the advice and instructions of the Attorney General of the United States and the Assistant Attorney General in charge of the Antitrust Division, respectfully declined to comply with the district court's order of November 7, 1949 (R. 86-87). Although this statement intimated

that some of the documents might be privileged (R. 85), this point was not argued in the district court and was not briefed or argued in the court below.[4]

On January 5, 1950, the district court entered an order finding respondent Hotchkiss guilty of contempt for refusing to produce the documents designated in the subpoena *duces tecum*, and for refusing to comply with the court's order of November 7, 1949. The order committed him to the custody of the Attorney General until he should comply with the provisions of the subpoena *duces tecum* and should obey the district court's order of November 7, 1949, or until he should be discharged from custody by due process of law. (R. 99.) On the same day, respondent Hotchkiss appealed from the order holding him in contempt of court (R. 100) and, by order of the Court of Appeals for the Seventh Circuit, he was admitted to bail on his own recognizance until further order of that court (R. 102).

On November 7, 1950, the court of appeals entered a judgment reversing the order of the district court. Judge Duffy rendered the opinion of the court, Chief Judge Major rendered a concurring opinion, and Judge Lindley rendered a dissenting opinion. (R. 128-140.) Judge Duffy's opinion held (R. 134) that "Rule 17(c) provides for the traditional type of trial subpoena, although as a matter of convenience it may be made returnable before the actual date of trial." Judge Duffy objected in particular only to the fact that the instant subpoena called for the production of documents which could not be reached under

4. In these proceedings, the Government has never relied on Department of Justice Order No. 3229 and Supplement No. 2 thereto which are involved in *United States* ex rel. *Roger Touhy* v. *Ragen and McSwain*, 180 F. 2d 321 (C. A. 7), now pending here, No. 83, present Term.

Rule 16. "It does not make sense," his opinion stated (R. 132), "to have created in one rule [16] a privilege of discovery limited to documents and papers belonging to the defendant or taken from others by seizure or process and at the same time to create in Rule 17(c) an almost *unlimited right of discovery* by use of the subpoena provisions" (italics supplied). Further to the same effect, Judge Duffy stated (R. 134) that Rule 17(c) "should not be construed so that the carefully drawn limitations in Rule 16 become meaningless * * * it may not be converted into an *unrestricted pre-trial discovery device*" (italics supplied). Since Judge Duffy drew only upon Rule 16 in cutting down the plain, broad language of Rule 17(c), and since Rule 16 applies only to discovery against the Government, it is accurate to describe Judge Duffy's opinion as based upon the fact that this subpoena was addressed to the Government.

Chief Judge Major's opinion concurred in Judge Duffy's reasoning (R. 134) and further took the position that the Government and its attorneys were excluded from the scope of Rule 17(c), and that Rule 17(c) applies merely to witnesses who are not parties or attorneys for parties (R. 134-138).

In his dissenting opinion, Judge Lindley pointed out that his "brethren read Rule 17(c) out of the books—completely delete it." He stated that the majority opinion "does violence to the plain language of" Rule 17(c). Judge Lindley was of the opinion that under Rule 17(c), the extent of relief to be granted thereunder was placed "within the discretion of the trial court". (R. 139.)

SUMMARY OF ARGUMENT.

I.

The plain, unambiguous language of Rule 17(c) of the Federal Rules of Criminal Procedure empowered the district court to permit the petitioners to inspect, "prior to the trial," the requested documents in respondent Hotchkiss' possession as designated in the subpoena *duces tecum* served upon him.

A. Since no problem is presented of construing or interpreting ambiguous or uncertain language in Rule 17(c), there is no need to examine its history. *Ex Parte Collett*, 337 U. S. 55, 61; *Wallace* v. *Cutten*, 298 U. S. 229, 237; *Packard Co.* v. *National Labor Relations Board*, 330 U. S. 485, 490-492; *Utah Junk Co.* v. *Porter*, 328 U. S. 39, 44.

The limitations on discovery pursuant to Rule 16 may not be read into Rule 17(c) by virtue of the *ejusdem generis* rule, because there is no uncertainty in the language of Rule 17(c), and the application of the *ejusdem generis* rule would contravene the liberal purposes of the Criminal Rules.

B. The liberal purposes of the Criminal Rules, as expressed in Rule 2, would be frustrated by reading the limitations of Rule 16 into Rule 17(c). In applying Rule 17(c) in this case, the district judge expressly stated that his purposes were to eliminate needless expense and delay and to provide for the just determination of this proceeding. These are the purposes of all of the Rules as expressed in Rule 2.

Rule 17(c) recognizes the public interest in disclosing relevant material, in an endeavor to arrive at a just determination of a criminal case. It was designed to give a trial court discretion to exercise intelligent pre-trial supervision in order to remove complications which would otherwise occur during the course of an intricate antitrust trial. It should not be so construed as to curtail the district court's power to expedite litigation, to provide in advance for an orderly presentation of the evidence at the trial, and to enable defendants more precisely to prepare for trial.

C. The history of Rule 17(c) shows that it was drafted "in the interests of fairness and for the purposes of preventing delay during the trial, particularly in cases where numerous documents may have been subpoenaed.". The district court's remarks in issuing the instant order show that the court was motivated by these very considerations.

D. Rules 16 and 17(c) are not in conflict and there is no need to impose upon Rule 17(c) the limits which apply to Rule 16.

1. Rule 17(c) contains adequate limitations of its own and does not create an "unlimited" privilege or right of pre-trial discovery.

2. Rule 17(c) codifies the former subpoena *duces tecum* practice under the common law and under Section 1651(a) of the Judicial Code. Its basic foundation is the right, secured by the Sixth Amendment, of every person accused of crime to have compulsory process to obtain witnesses in his favor. Rule 16, on the other hand, is a restraint upon the prosecutor. It was designed to prevent him, by withholding relevant material until the trial, from disrupting the operation of a defendant's business and impeding the efforts of the accused to prepare his defense. Thus Rule 16 merely grants *additional protection* to a defendant, and is not in derogation of his otherwise broader privilege of obtaining such process as is necessary properly to present his defense.

3. The Government has waived any objection to the scope of the subpoena *duces tecum* other than its objection founded on the restrictions of Rule 16. Accordingly, it may not raise the "fishing expedition" cry here. *United States* v. *Atkinson*, 297 U. S. 157; *Weade* v. *Dichmann, Wright & Pugh*, 337 U. S. 801. Moreover, that objection is not well-founded. *Brown* v. *United States*, 276 U. S. 134, 143; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 554; *United States* v. *Burr*, 25 Fed. Cas. No. 14694 (C. C. D. Va.); *Hickman* v. *Taylor*, 329 U. S. 495, 507. In essence, the Government's objection to the scope of the subpoena rests on "privilege" but it would, if sustained, prevent the courts from determining when and to what extent a privilege from discovery should attach. The record affords no foundation for the determination of this privilege argument, for the Government has never directly expressed a claim that *any* of the documents which it refuses to produce are privileged.

4. A subpoena under Rule 17(c) may properly be addressed to an attorney for the Government. The history of Rule 17(c) shows that it is substantially the same as Civil Rule 45(b), which has been held applicable to the Government. In effect, the opinion below holds that Rule 17(c) does not authorize certain types of subpoenas against the Government, but such a crippling interpretation of Rule 17(c) would be contrary to previous federal and state practice and would seriously curtail the discretionary powers of the trial judge over criminal proceedings.

5. The language of Rule 17(c) and its history show that pre-trial inspection thereunder need not be limited to evidentiary material which is to be offered at the trial by the party subpoenaing it. Moreover, such a limitation would be impractical.

6. The history of Rule 17(c) shows that it was designed to permit the production of documents "independently of testimony," and therefore it is immaterial that the present subpoena did not contain an *ad testificandum* clause.

II.

Decisions based on the American common law, the Constitution, Rule 17(c) and the Judicial Code, afford ample precedent for the action of the trial court.

A. Although pre-trial inspection of documents in criminal cases was not permissible at common law in England in the Eighteenth Century, the English rule has been liberalized. The American common law cases did not adhere to the early English rule. For example, in *United States* v. *Burr*, 25 Fed. Cas. No. 14692d, 14694 (C. C. D. Va.), Chief Justice Marshall held that under the Sixth Amendment an accused was entitled to a subpoena *duces tecum* to obtain pre-trial inspection of documents that might be material to his defense. Cf. *United States* v. *Coplon*, 185 F. 2d 629, 637-638 (C. A. 2).

Even disregarding Rule 17(c), the instant subpoena would be lawful at common law and under the Fifth and Sixth Amendments. Section 1651(a) of the Judicial Code, providing that Federal courts may issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law", is an additional authority for the district court's order. Cf. *American Lithographic Co.* v. *Werckmeister*, 221 U. S. 603, 609.

B. Judicial interpretations of Rule 17(c) support the views adopted by the trial court. In *United States* v. *Bondy*, 171 F. 2d 642, the Court of Appeals for the Second Circuit rejected the arguments advanced here by the Government. In addition, three district courts and a New Jersey court interpreting an identical rule, have granted subpoenas *duces tecum* under Rule 17(c) directed to the prosecutor. The three contrary district court decisions were decided largely on issues not involved here, and they do not justify a decision that Rule 17(c) is unreasonable unless interpreted as if its language incorporated that of Rule 16.

ARGUMENT.

Introduction.

This case presents a problem of statutory interpretation. Petitioners contend that the applicable rules of statutory interpretation require that the clear, unambiguous language of Rule 17(c) be given full effect, since to do so would further, rather than obstruct, the general policies of the Federal Rules of Criminal Procedure announced in Rule 2. If this is done, the action of the trial court will be upheld. The court below did not so interpret the language of Rule 17(c) but instead interpreted it to be limited by Rule 16, a separate and independent rule. Part I of petitioners' brief will show that Rule 17(c) was properly interpreted and applied by the district court.

The full significance of this case, however, appears only when Rule 17(c) is read in the light of common law precedents and constitutional principles. Part II of this brief, therefore, will consider the common law and constitutional doctrines which sanction the action taken by the trial court.

I.

THE FEDERAL RULES OF CRIMINAL PROCEDURE AUTHORIZED THE DISTRICT COURT TO ORDER RESPONDENT HOTCHKISS TO PRODUCE THE SUBPOENAED DOCUMENTS FOR PRETRIAL INSPECTION BY PETITIONERS.

The plain, unambiguous language of Rule 17(c) empowered the District Court to enter the inspection order.

In pertinent part, Rule 17(c) of the Federal Rules of Criminal Procedure (*supra*, p. 2) provides:

> "The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portion thereof to be inspected by the parties and their attorneys."

By its terms, this provision empowered the district court to permit the petitioners and their attorneys to inspect, "prior to the trial", the subpoenaed documents.

The majority opinion below does not rely upon any of the express terms of Rule 17(c) in reversing the trial court. Neither does that opinion point to any ambiguity or uncertainty in the Rule, but concedes (R. 134) that "the language of Rule 17(c) is broad." When the subpoena and order are read in the light of the specific language of Rule 17(c), it is obvious that the trial court acted within the purview of the Rule.

Parts I-A through I-C of this brief will demonstrate that, although there is no need to resort to them in view of the clarity of the language of Rule 17(c), the general policies of the Federal Rules of Criminal Procedure and the history of Rule 17(c) support the trial court's application of the rule to this case. Part I-D will show that the separate and independent provisions of Rule 16 do not conflict with, and should not be grafted into, the broad provisions of Rule 17(c).

A. Since the Language of Rule 17(c) Is Plain, It Is Unnecessary to Consider Its History.

Since no problem is presented of construing or interpreting ambiguous or uncertain language in Rule 17(c), there is no need to examine its history. As this Court stated in *Ex Parte Collett*, 337 U. S. 55, 61:

> "Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of § 1404(a) but from its legislative history. *The short answer is that there is no need to refer to the legislative history where the statutory language is clear.* 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 260 (1945). This canon of construction has received consistent adherence in our decisions." [Italics supplied.]

Mr. Justice Brandeis, in *Wallace* v. *Cutten*, 298 U. S. 229, pointed out (at p. 237):

> "It would be inappropriate for us to discuss these, and other, arguments presented. The language of § 6 (b) is clear; and on the face of the statute, there can be no doubt concerning the intention of Congress. As was said in *Iselin* v. *United States*, 270 U. S. 245, 250-251: 'The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably [possibly] by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.'"

While the *Cutten* case involved an attempt to enlarge the plain meaning of the statute, *Packard Co.* v. *National Labor Relations Board*, 330 U. S. 485, applied the same rule

in refusing to constrict the plain meaning of a statute. Despite reasons of policy (p. 493) and of legislative history (p. 492) for interpreting the term, "employees," in the Act as excluding foremen, this Court stated (330 U. S. at p. 490), "the effect of the National Labor Relations Act is otherwise, and it is for Congress, not for us, to create exceptions or qualifications at odds with its plain terms"; and again (p. 492), "There is, however, no ambiguity in this Act to be clarified by resort to legislative history * * *."

It was thus improper for the court below to "create exceptions or qualifications at odds with * * * [the] plain terms" of Rule 17 (c) by resorting to the history of Rule 16.

In *Utah Junk Co.* v. *Porter*, 328 U. S. 39, the Court construed certain procedural provisions of the Emergency Price Control Act of 1942, as amended by the Stabilization Act of June 30, 1944. By amendment, Congress had deleted a sixty-day period for protesting provisions of price schedules and (328 U. S. at p. 42) "amended the procedure so that a protest * * * could be filed 'at any time' after the effective date." The Government argued that the 1944 amendment applied only to price schedules which were active when the Act was passed, and not to those which had been superseded by that time. The Court rejected this argument in terms which are applicable here, stating (328 U. S. at p. 44):

> "We find nothing in this language of the 1944 amendment of § 203 (a), or in its history, or in any illumination otherwise shed upon the terms this legislation, to justify *reading in a qualification that Congress has left out.*
>
> "All construction is the ascertainment of meaning. And literalness may strangle meaning. *But in construing a definite procedural provision we do well to*

stick close to the text and not import argumentative qualifications from broad, unexpressed claims of policy." [Italics supplied.][5]

As shown at pp. 18-25, *infra*, insofar as broad policy considerations are relevant here, "they tell against cutting down the natural meaning of the language" (*Utah Junk Co.* v. *Porter*, 328 U. S. 39, 44) of Rule 17(c).

In reliance on the Government's reply brief, the court below apparently resorted to the *ejusdem generis* rule in grafting the limitations of Rule 16 into Rule 17(c). However, the *ejusdem generis* rule "cannot be employed to render general words meaningless." *United States* v. *Alpers*, 338 U. S. 680, 682. As stated in *Browder* v. *United States*, 312 U. S. 335, 338, "No single argument has more weight in statutory interpretation than" coverage by "The plain meaning of the words of the act." The *ejusdem generis* rule is only to be followed where there is uncertainty in the statutory language and where the result of its application will not conflict with the general purposes of the statute. *Gooch* v. *United States*, 297 U. S. 124, 128; *Securities and Exchange Commission* v. *Joiner Leasing Corp.*, 320 U. S. 344, 350-351.[6] Here there is no uncertainty in the language of Rule 17(c), and the application of the *ejusdem generis* rule would contravene the liberal purposes of the Criminal Rules, which are declared in Rule 2 (discussed *infra*, pp. 18-20).

In view of the clarity of Rule 17(c), resort to its legislative history is thus unnecessary, and the *ejusdem generis* rule does not make Rule 16 or its history pertinent to consideration of the meaning of Rule 17(c). Moreover, as is

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5. See also *Continental Casualty Co.* v. *United States*, 314 U. S. 527, 530; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 45; and *United States* v. *Bowen*, 100 U. S. 508, 513.

6. See also pp. 6-11, 17 of the Government's brief in *United States* v. *Alpers*, No. 217, October Term, 1949.

demonstrated *infra*, pp. 25-28 and 29-36, such extrinsic aids, though unnecessary here, support the action of the trial court rather than the decision of the court of appeals.

B. The Trial Court's Interpretation of Rule 17(c) Conforms to the Liberal Policies of the Federal Rules of Criminal Procedure.

The court below held, and the Government here contends, that Rule 17(c) must be read in the light of Rule 16 and that, accordingly, the petitioners may not inspect before trial any documents in the Government's possession *unless they belong to the petitioners, were obtained from them, or were obtained from others by seizure or process* (R. 134; Br. in Opp. 6, 9-12, 15-16). The general policies of the Federal Rules of Criminal Procedure preclude this narrow construction.

The Government does not contend that the district court's interpretation of Rule 17(c) placed that Rule in conflict with the general policies of the Federal Rules of Criminal Procedure. On the contrary, it is evident from the terms and implications of Criminal Rule 2, that the district court's interpretation of Rule 17(c) is consistent with the general purposes of the Rules, while the interpretation advanced by the court below conflicts with those purposes.

The fundamental policies of the Federal Rules of Criminal Procedure are expressed as follows in Rule 2:

> "Purpose and Construction. These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

Dean (now Chief Justice) Arthur T. Vanderbilt, Chairman of this Court's Advisory Committee on these Rules,

addressed the following remarks to the opening session of the Institute on Federal Rules of Criminal Procedure in New York City on February 15, 1946:[7]

> "I regard Rule 2 as the most important rule of the whole set. It sets forth that these Rules are intended to provide for a just determination of every criminal proceeding. It announces that they should be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. The rule in a sense corresponds with the last sentence of Rule 1 of the Federal Rules of Civil Procedure, which provides that they shall be construed to secure a just, speedy and inexpensive determination of every civil action. Our Rule 2 spells out the intent in somewhat greater detail because of the greater necessity of overcoming some ancient notions of criminal proceedings as a game.[8]
>
> "The purpose of the Committee in inserting the rule is to indicate to the trial judges in the first instance and to the appellate judges on review that they not only have the power but the responsibility of seeing to it that the Rules are interpreted and applied so that they do in fact bring about a just determination of every criminal proceeding and that they do in fact secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. Rule 2 expresses the spirit that is intended to motivate the application of all the sixty rules promulgated by the Supreme Court and to make it very clear that they are not in any case to be interpreted technically so as to defeat the ends of justice."

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7. Proceedings of the Institute on Federal Rules of Criminal Procedure (New York University School of Law, Institute Proceedings, Vol. VI, 1946), pp. 120-121.

8. Dean Wigmore also disapproved of regarding criminal proceedings as a game in which the prosecution's evidence would remain undisclosed until the trial. See 6 Wigmore on Evidence (3rd ed. 1940) §§ 1845, 1850, 1859, 1859*g*, 1863. See also Berger and Krash, "Government Immunity from Discovery" (1950), 59 Yale L. J. 1451.

To circumscribe the clear, unambiguous provisions of Rule 17(c) with the narrow provisions of Rule 16 would be contrary to Dean Vanderbilt's admonition not to interpret a rule "technically so as to defeat the ends of justice." It would ignore what he terms "the greater necessity of overcoming some ancient notions of criminal proceedings as a game."

The objectives stated in Criminal Rule 2 are comparable to those of the Federal Rules of Civil Procedure, Rule 1 of which provides that the Civil Rules:

> "shall be construed to secure the just, speedy, and inexpensive determination of every action."

In *Hickman* v. *Taylor*, 329 U. S. 495, the Court epitomized the conclusions of many courts that the discovery procedures provided by those rules are effective means of advancing the ends of justice, fairness and economy, when it stated (329 U. S. at p. 507): "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." In view of the guarantees of the Fifth and Sixth Amendments, this statement is even more applicable to criminal proceedings. In fact, "The [inspection] rule governing criminal prosecutions might well be given wider scope" than the corresponding provisions in the Civil Rules.[9]

The district court was fully aware of the broad policies of the Criminal Rules, when it dealt with the issue now on appeal. As the court stated in the proceedings on November 7, 1949, the date on which it exercised its discretion to enter the order directing Government counsel to obey the subpoena *duces tecum* (R. 62):

> "Well, we have had quite a broad experience with the new civil rules, and they have been a great step

9. Berger and Krash, "Government Immunity from Discovery" (1950), 59 Yale L. J. 1451, 1452 (note 8), 1466.

forward in the handling of litigation, and they have brought progress. And we have used them to require the litigants to show their facts on the table to speed up and bring an end to litigation. * * * instead of taking six months to try a case it really ought to be tried in two or three weeks if we can do it.

"I know how offensive an idea it is to a lawyer to make him show his case, that it is much like plunging a dagger into his heart. But the judge takes a somewhat different view of it to the end of getting through with the litigation and doing justice between the parties. * * *"

Thus the elimination of needless expense and delay was a primary consideration which led the court to interpret Rule 17(c) as it did.

The court was equally mindful of the purpose of the Rules to provide for the just determination of every criminal action and to secure fairness in procedure. At the conclusion of the hearing on January 4, 1950, in deciding that respondent Hotchkiss should be found in contempt of court, Judge Barnes earnestly declared (R. 82):

"When the United States stands in this court or in any other court and says that it has a right to maintain in the files of its officers papers which may be relevant to the issues to be determined in court—when the United States says that it has a right to do that and to refuse such information to parties litigant, then it is taking a long, long step toward a police state.

"That is exactly what you are doing. You might as well realize * * * that if you are sustained in this position which you are taking here which you do by the direction of the Attorney General, then you and your associates are taking a long, long step toward a police state, and you are saying in effect that, 'the court shall not determine whether papers which we have in our control have any bearing upon these issues; we determine that, we, the police power of the United

States are going to determine that, and the courts are not permitted to do that.'

"Now, if we are going to take that long, long step toward the police state which you propose to take, and which you will take right now—and will take if this court and other courts permit you, you do it without * * * [my] voluntary cooperation. Some other court that has more power than I will have to say that you have a right to take that step, which I say is a step toward the police state."

That the district court's interpretation of Rule 17(c) was proper and within its discretionary power appears from a consideration of the circumstances from which the question arose. The indictment (R. 3-9) is barren of specifications as to when, where, and through whom any of the petitioners performed any of the acts, omissions, or types of acts or omissions of which they are accused.[10] For eight large dairy companies to prepare a defense to an indictment founded on their innumerable wholesale sales over "approximately seven years" (R. 6), is impossible without more particular knowledge of the specific acts or omissions which the Government intends to prove. In the same order in which the court denied the Government's motion to quash the subpoena, it determined petitioners' motions for an extensive bill of particulars. The court denied the requests for all particulars except those relating to when and through whom each of the defendants joined the alleged conspiracy (R. 75).

By providing defendants with the opportunity to inspect documents in the possession of the prosecution, Rule 17(c) helps to eliminate unfair surprise, unjustifiable ex-

10. Rule 7(c) of the Federal Rules of Criminal Procedure abolished the former, detailed, long form of indictment and now requires "a plain, concise and definite" statement. Like the newer forms of pleadings in civil cases, these simpler indictments serve a notice function primarily and must be supplemented by reasonable inspection of documentary materials "prior to the trial".

pense, and needless delay during the trial of a case, and assists in bringing about a just determination of a proceeding. These objectives were sought to be achieved in this case by permitting the petitioners to inspect, "prior to the trial", documentary materials which would give them an opportunity to know more exactly the issues in the cause. Inspection of the documents in advance of the trial, rather than during its course, would greatly aid petitioners in determining the relevant facts and in unearthing other documents and records bearing on their innocence.

It is well established that "The public interest in a full and fair hearing of all disputes between individuals and between individuals and the state calls for the production and disclosure of all evidence relevant to the issues in dispute."[11] Thus, Federal Judge Emerich B. Freed, formerly a United States Attorney, recently stated that

> "* * * it should be the policy of the law to permit as broad a scope of inspection and discovery in criminal cases as apply in civil trials. I cannot believe that any one will be deprived of a right by * * * means of unearthing the facts, whether those facts are pertinent in a criminal prosecution or a civil action." (33 American Bar Ass'n Journal 1010, 1068 (1947).)

Rule 17(c) recognized this public interest. As stated by Wendell Berge, then Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, its pre-trial inspection feature was designed "to reduce the element of surprise, and * * * to facilitate the trial of cases."[12]

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11. Sanford, "Evidentiary Privileges against the Production of Data within the Control of Executive Departments" (1949), 3 Vanderbilt L. Rev. 73; see also Berger and Krash, "Government Immunity from Discovery" (1950), 59 Yale L. J. 1451, 1466.

12. Berge, "The Proposed Federal Rules of Criminal Procedure" (1943), 42 Mich. L. Rev. 353, 368. Before heading the Antitrust Division, Mr. Berge was Assistant Attorney General in charge of the Criminal Division of the Department of Justice.

The Rules of Criminal Procedure govern a wide variety of prosecutions. The issue presented here is not merely an inspection problem, but concerns the discretion of a trial court to exercise intelligent supervision of an intricate criminal antitrust case. The Federal Rules of Criminal Procedure should be construed to enable a district court to guide the orderly progress of a trial. The district court's inherent power to control the disposition of litigation pending before it should not be thwarted by a narrow construction of the pre-trial procedures provided by the Criminal Rules.[13]

The Judicial Conference of the United States in its report dated November 25, 1949, recognized the significance, from the standpoint of the public interest, of "effective, expeditious and economic disposition" of anti-trust litigation (Report of the Judicial Conference of the United States held at Washington, D. C., September 22-24, 1949, pp. 26-27). Judges Wyzanski and Medina, before whom important antitrust cases are pending, have entered orders directed to both parties providing for pre-trial inspection and discovery calculated to expedite those cases and reduce them to a manageable compass.[14] Rule 17(c) furnishes the trial judge in a criminal case with an effective tool to provide in advance for an orderly presentation of the evidence at the trial, to save the court's time and to enable defendants more precisely to prepare for trial.

It has recently been pointed out that the Government

13. Cf. McAllister, "The Big Case: Procedural Problems in Anti-Trust Litigation" (1950), 64 Harv. L. Rev. 27, 61; Dession, "The New Federal Rules of Criminal Procedure: II" (1947), 56 Yale L. J. 197, 221-222; Dession, "The Trial of Economic and Technological Issues of Fact: I and II" (1949), 58 Yale L. J. 1019 and 1242. Professor Dession was a member of this Court's Advisory Committee on the Criminal Rules.

14. See McAllister, *op. cit.*, pp. 28, 29, 31-32, 36, 39, 53 and 59.

should reciprocate in the inspection of documents in anti-trust cases. Thus, Judge Yankwich stated:

> "In all these [antitrust] cases, * * * the Government expects the utmost cooperation of the defendants or even *prospective defendants* in placing their files and records, ranging over periods of years, at the disposal of its agents. When objection is encountered, the widest use is made of the process of the courts. A justified criticism of the Government is, however, that *it is not so generous in reciprocating.* Thus, the Government stands on the liberal rules which allow them to plead the facts generally and resists *at all stages, every attempt to compel them,* through bills of particulars, to supply data which would give the defendants a definite idea of the line of attack which they may expect at the trial. Judges, in our circuit, including myself, have been rather generous in compelling disclosure, so as to *channel* the inquiry. I believe that this method has been time-saving, * * *." (Yankwich, "Observations on Anti-Trust Procedures" (1950), 10 F. R. D. 165, 168; author's italics.)

The decision of the court below fails to recognize the policy of the Federal Rules of Criminal Procedure that, in the interest of simplicity and of expedition of trials, a liberal discretion should be given to the trial judge in regard to pre-trial disclosure in order to "channel the inquiry." Its history shows that Rule 17(c) was intended to grant such discretion to the district courts.

C. The History of Rule 17(c) Supports the Action of the District Court.

As shown on pp. 14, 18-25, *supra,* both the express language of Rule 17(c) and the general policies of the Criminal Rules authorized the district court's order. The history of the Rule likewise warrants the action of the trial judge. The final sentence of Rule 17(c), which authorizes district

courts to permit inspection of subpoenaed documents "prior to the trial," was explained as follows in the Advisory Committee's notes to the preliminary and second preliminary drafts of Rule 17(c):

> "The last sentence provides for a method by which the court may permit either side to inspect subpoenaed documents or objects under the supervision of the court. It is inserted in the *interests of fairness* and for the *purpose of preventing delay during the trial,* particularly in cases where numerous documents may have been subpoenaed." [Italics supplied.][15]

These are precisely the considerations which motivated the district court in directing Government counsel to obey the subpoena *duces tecum* (see quotation from the court's remarks, *supra,* pp. 20-21).

In an article on the Federal Rules of Criminal Procedure, Professor Dession, a member of the Advisory Committee and formerly a Special Assistant to the Attorney General in the Antitrust Division, explained Rule 17(c) as follows:[16]

> "With respect to subpoenas for the production of documents or objects—the *duces tecum*—subdivision (c) contains one new provision and otherwise restates the familiar practice. The new provision is this:
>
> > 'The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their pro-

15. Federal Rules of Criminal Procedure, Preliminary Draft (1943), pp. 107-108; Federal Rules of Criminal Procedure, Second Preliminary Draft (1944), p. 99. Rule 17(c) was Rule 20(b) of the preliminary draft and was Rule 19(c) of the second preliminary draft. Rule 17(c) was virtually unchanged after publication of these notes, and they are therefore still pertinent, as the Government concedes (Br. in Opp. 14, note 7).

16. Dession, "The New Federal Rules of Criminal Procedure: II" (1947), 56 Yale L. J. 197, 221-222.

duction permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.'

"This provision invites an exception to the 'normal' practice in the handling of documents produced in response to a subpoena *duces tecum*. Normally, 'the books and other things called for would merely be brought into court at the time of the trial, let us say immediately before they are to be offered in evidence, * * *.' The party calling for the documents, as well as the court, would then have had no prior opportunity to examine them. This normal practice makes sense in cases of no more than average complexity which can in any event be tried in from one to five days. The common law rules of procedure and of evidence were, of course, developed out of experience with such cases. Given but a few relevant documents (perhaps a contract or a few letters), it is perfectly feasible to call for them and see them for the first time in open court—and for judicial process to absorb the delay while the party who served the subpoena studies the document to determine whether the producing party has complied, and *whether the document is to be used;* or while the court, if there is an objection to production of a document, studies it to see whether it is relevant, material and non-privileged. In federal practice, however, one must also envisage trials which involve thousands of documents and consume many months of trial. Most major antitrust proceedings are of this description, as are various classes of cases arising under other industry-regulation statutes.

"The only practicable solution, if such cases are to be tried before courts, is a subpoena practice which permits of a sifting in advance of trial of the documents actually to be offered in evidence. The court can hardly participate in the preliminary sifting, for the relevance and materiality of most such documents will be circumstantial, and under our system of adjudication the court is not supposed to know enough about the evidence before trial to have an informed

judgment on the circumstantial relevance and materiality of any given bit of proof. Such practical considerations led the district court in the recent *American Tobacco* anti-trust case to adopt the very practice since sanctioned by this Rule." [Italics supplied.]

The instant order is fully consistent with this authoritative explanation. It should be noted that the party who obtains the subpoena may study the subpoenaed document to ascertain "whether the document is to be used" (56 Yale L. J. at pp. 221-222). There is no requirement that the subpoenaed documents must be documents which will definitely be offered in evidence (see *infra*, pp. 46-49). In fact, in the *American Tobacco* case to which Professor Dession refers, before the promulgation of the Federal Rules of Criminal Procedure, through the use of subpoenas *duces tecum*, the Government inspected documents of the indicted defendants prior to the trial, regardless of whether such documents were to be offered in evidence. See *American Tobacco Co.* v. *United States*, 147 F. 2d 93, 116 (C. A. 6), affirmed, 328 U. S. 781.

D. The Limitations Which the Government Proposes and the Court Below Adopted Conflict With the Plain Language of Rule 17(c) and Would Defeat Its Objectives.

Despite the affirmative grant of discretionary power to the district courts in Rule 17(c), the policies announced in Rule 2, and the history of Rule 17(c), the Court is asked to insert all of the limiting language of Rule 16 into the permissive language of Rule 17(c). Neither reason nor authority supports the request.

1. Rule 17(c) Contains Its Own Limitations.

It is urged that unless the limitations of Rule 16 are read into Rule 17(c), an "unlimited privilege" of pre-trial discovery would be permitted by Rule 17(c) (Br. in Opp.

11-12), and the court below held that otherwise "an almost unlimited right" of discovery would be created (R. 132). But Rule 17(c) is a discretionary rule and contains effective limitations. It is merely permissive and, in addition, authorizes the district court to "quash or modify * * * unreasonable or oppressive" subpoenas. The terms of Rule 17(c) grant a *restricted and limited privilege* to inspect all, or parts of, the subpoenaed documents, if the district court should decide in its discretion that such inspection is warranted. The fact that Rule 17(c) contains its own special safeguards, *differing from those in Rule 16*, refutes the argument that it was the intent of the draftsmen to impose the limitations of Rule 16 upon Rule 17(c).

2. Rule 16 Is Not a Limitation on Rule 17(c) Because Each Has a Separate and Distinct Function.

The Government's principal argument is "that the right of defendants in criminal proceedings to obtain access to documents and other papers in the custody of attorneys for the Government is limited to the rights granted to such defendants by Rule 16 of said Rules" (Br. in Opp. 6; see also pp. 9, 10, 11, 12, 15 and 16 thereof). The literal words and the history of Rule 17(c) refute this argument. The Government, therefore, resorts to the history of Rule 16 (Br. in Opp. 10, 19, 20) in an attempt to support its conclusion.

The process whereby Rule 16 was reduced from a nearly exact counterpart of Civil Rule 34 to its present form is also the basis of the inference by the court below that Rule 16 precludes pre-trial inspection by use of subpoenas *duces tecum* (R. 132).

The majority opinion below apparently finds the presence of Rule 16 in the body of the rules inconsistent with the contention of petitioners as to the discretionary privileges

granted to them under Rule 17(c). This is demonstrated by the statement (R. 132) therein that:

> "* * * it is difficult to believe that the framers of the rule intended to authorize the discovery and inspection of broad scope under Rule 17(c) pertaining to subpoena which was expressly prohibited by Rule 16 * * *."

Rule 16 does not, of course, "expressly prohibit" pre-trial inspection under Rule 17(c), and the court points to no words from Rule 16 to support that statement. This same supposed inconsistency, however, is seized upon by the Government (Br. in Opp. 11, 12).

Rule 17(c) is a provision the primary purpose of which is to implement the constitutional right of an accused person to have compulsory process to obtain witnesses in his favor, as guaranteed by the Sixth Amendment. The right to subpoena witnesses necessarily implies the right to subpoena documents. *United States* v. *Burr*, 25 Fed. Cas. No. 14692d (C. C. D. Va.) at p. 34. (See *infra*, p. 59.) Rule 17(c) is but a codification of the former subpoena *duces tecum* practice permitted under the common law and under Section 1651(a) of the current Judicial Code (see pp. 52-65, *infra*, and Appendix). Rule 17(c) makes that practice explicit.

G. Aaron Youngquist, formerly Attorney General of the State of Minnesota and Assistant Attorney General of the United States, and a member of the Advisory Committee of this Court, said in discussing Rule 17(c):

> "Furthermore, while normally under a subpoena the books and other things called for would merely be brought into court at the time of the trial, let us say immediately before they are to be offered in evidence, there is a provision in this rule that the court may, in the proper case, direct that they be brought into court in advance of the time that they are offered in evidence, so that they may then be inspected in advance, *for the*

purpose of course of enabling the party to see whether he can use it or whether he wants to use it." [Italics supplied.][17]

While Rule 17(c) was thus intended as a method of securing to defendants the right to have compulsory process in their favor, Rule 16 is, in its origin and in its effect, a limitation upon the powers of the prosecution rather than an affirmation of the rights of the accused.

One of the reasons for Rule 16 is described in a statement made by Judge Medalie at the Institute on Federal Rules of Criminal Procedure. Judge Medalie, a former United States Attorney for the Southern District of New York and a member of the Advisory Committee of this Court, said, in discussing Rule 16:

> "Now there is the discovery and inspection rule. I think all lawyers will agree—and even young prosecutors will agree—it is a wholesome rule. If the district attorney, or his post office inspectors, or agents in anti-trust cases, come into a person's place of business and with a subpoena take advantage of his terror, back up a truck or two and take all of his papers out and load them up, this rule would permit an inspection of these papers * * *."
>
> "Much of this developed because in the anti-trust prosecutions great business organizations would find themselves denuded of much of their papers and records and then want to have a look at them, and they would be met by a blank stare from the custodian of those books, papers, and records."[18]

Rule 16, according to this authoritative explanation, fills a need which arises from the crippling effect upon a defendant's business which results from the prosecutor's action in stripping the business of its operating records. The

17. Proceedings of the Institute on Federal Rules of Criminal Procedure (New York University School of Law, Institute Proceedings, Vol. VI, 1946), pp. 167-168. Fred E. Strine, then in charge of the Criminal Division of the Department of Justice, was one of the panel discussion leaders.

18. Proceedings of the Institute on Federal Rules of Criminal Procedure (New York University School of Law, Institute Proceedings, Vol. VI, 1946), p. 277.

effect is no less harmful and unjust where the seizure or subpoenaing of the records has been lawful than it is where there has been an illegal seizure of records. The remedy in the latter situation is an order for return of property and to suppress evidence under Criminal Rule 41(e). Rule 16 was designed to remedy the comparable injustice which often exists where the procurement of the records was lawful.[19]

Significantly, Rule 16 does not limit the defendant's privilege of inspecting his own documents to those which have been taken from him by seizure or process. This fortifies our conclusion, consistent with Judge Medalie's remarks, that the Rule is intended to operate as a restraint upon the prosecution by affording a remedy for the arbitrary retention of records needed to operate a defendant's business—a function much different from that of Rule 17(c).

Rule 16 also goes two steps farther. First, it permits a defendant to inspect his own seized or subpoenaed records, not only for reasons of business necessity, but also for the purpose of preparing his defense. This was the procedure applied in *United States* v. *B. Goedde & Co.*, 40 F. Supp. 523 (E. D. Ill.). The reliance of the Advisory Committee upon the *Goedde* case is indicated in its Note to Rule 16 where, after citing the case, the Committee declares:

"The Rule is a restatement of this procedure."

As the trial judge who decided the *Goedde* case, Judge Lindley was well aware of the "procedure" of which Rule 16 "is a restatement" when he stated in his dissenting opinion herein (R. 139) that:

"Rule 16 provides for the production of certain documents. Rule 17(c) authorizes a subpoena *duces tecum*,

19. It is pertinent to note how long documents are sometimes held by the prosecution. In the instant case, the order impounding documents was dated September 17, 1947 (R. 110, 111) and is still in force.

—an age-old expedient for securing the production of documents * * *.

* * * * *

"* * * there is no conflict between the two rules * * *."

Finally, Rule 16 also permits a defendant to inspect certain other documents, not his own, the retention of which by the prosecutor imposes unreasonable obstacles to the preparation of his defense. The statement of Judge Medalie concerning Rule 16, which is quoted *supra* (p. 31), concludes:

> "So we have the rule that you can go to court and get an order directing that you can look at your own books, papers, and records, and maybe a little more, too, again counting on the fact that most judges are fair."'

By "a little more" Judge Medalie apparently referred to the documents *not* belonging to the defendants, which the prosecutor had "obtained from others by seizure or process." This feature of Rule 16 was inserted primarily to limit still another unfair advantage, gained by the prosecutor who obtains evidence which is important to the defendants, and thereby denies them an opportunity to obtain it themselves.

In this connection, the Advisory Committee's note to Rule 16 states:

> "In addition, it permits the procedure to be invoked in cases of objects and documents obtained from others by seizure or by process *on the theory that such evidential matter would probably have been accessible to the defendant if it had not previously been seized by the prosecution.*"[20] (Italics supplied.)

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20. This latter privilege is qualified in Rule 16 by the necessity of a showing that the items sought should be material to the preparation of the defense. Such a qualification was undoubtedly necessary so that records and documents of others might not be indiscriminately viewed by defendants for purposes other than the preparation of a proper defense. Rule 17(c) does not require such a limitation because it is separately limited by its provision in regard to a motion to quash or modify the subpoena.

Rule 16 thus curtails two kinds of abuses of the power of the prosecutor,—preventing the accused from continuing his business by denying him access to records essential to its operation, and foreclosing defendants from obtaining materials which would be useful in the preparation of their defense.

The necessity for affording such privileges to the defendant was commented upon by Judge Yankwich in his "Observations on Anti-Trust Procedure", 10 F. R. D. 165, 168, quoted at p. 25, *supra*, wherein he remarked that the Government expects the utmost cooperation from defendants, but that it is seldom generous in reciprocating.

In addition, Rule 16 assures defendants of relief during the entire pendency of the proceedings,[21] which otherwise would have been available to them only when the trial was closer at hand, through the subpoena process as restated in Rule 17(c), or as more generally preserved under Section 1651(a) of the Judicial Code.

Thus, it was not the intention of the Advisory Committee to limit all rights of discovery and inspection by the adoption of Rule 16. Rule 16 grants *additional privileges* to the defendant and in no way detracts from his otherwise broader privileges in obtaining such process as may be necessary to prepare and present his defense.

We submit that both Rule 16 and Rule 17(c) grant to

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21. The second preliminary draft of the Rules incorporated in Rule 18 [final Rule 16], after the words "indictment or information," the phrase "and after he has been arraigned." Federal Rules of Criminal Procedure, Second Preliminary Draft (1944), p. 94. This qualification was omitted from the final draft. From this, we conclude that the framers intended the qualified rights granted by Rule 16 to exist throughout the pendency of the proceedings. *Per contra*, the provision of Rule 17(c) permitting pretrial inspection must, it would appear, have a reasonable relation to trial.

defendants certain protections and privileges which represent enlightened judicial thinking in accordance with the spirit of the rules as defined in Rule 2. Neither Rule is designed to exhaust a defendant's privileges or to limit and restrict the other. They complement each other.

That such was the true relation between a discovery order such as Rule 16 permits and a subpoena *duces tecum* for pre-trial inspection of relevant material was indicated by the Court of Appeals for the Second Circuit, even before adoption of the Rules, in *Weinberg* v. *United States*, 126 F. 2d 1004. In that criminal case, a petition for the return of certain property by the prosecutor had been denied, but the court of appeals reversed, stating (p. 1008):

> "Of course, the process of subpoena could have been employed to bring the evidence before the court, 28 U. S. C. A. § 377; *American Lithographic Co.* v. *Werckmeister*, 221 U. S. 603, 31 S. Ct. 676, 55 L. Ed. 873; an order to the prosecution's lawyer, an officer of the local court, is merely a more natural and direct way of achieving the same end under the Go-Bart case, supra. [*Go-Bart Importing Co.* v. *United States*, 282 U. S. 344.]"

There is further important evidence in the Advisory Committee's notes which shows that Rule 16 was not intended to supplant or restrict pre-trial use of subpoenas for production and inspection of documents. In drafting Rule 16, the Advisory Committee originally included in its notes a reference to *United States* v. *Burr*, 25 Fed. Cas. No. 14,692d, 14,694 (C. C. D. Va.), but after restricting the scope of the rule so that the type of material involved in the *Burr* case was no longer provided for, the reference was deleted.[22] It would hardly be argued that the Advisory Committee thereby sought to override Chief Justice Mar-

22. Compare the Advisory Committee's final Note to Rule 16 with Federal Rules of Criminal Procedure, Preliminary Draft (1943), p. 103; and Federal Rules of Criminal Procedure, Second Preliminary Draft (1944), pp. 94-95.

shall's decision in the *Burr* case, particularly when one considers that the decision rested upon the Sixth Amendment and other fundamental considerations of fairness. The only logical inference is that the draftsmen of Rule 16 realized that a subpoena *duces tecum* was involved in the *Burr* case, and that it was out of place, therefore, to cite that case under the rule providing for discovery and inspection by motion and order. Their obvious intention was to codify the already liberal subpoena *duces tecum* practice in the subpoena *duces tecum* rule (Rule 17(c)).

3. The Only Issue as to the Scope of the Subpoena Is Whether It Should Have Been Limited to Documents Obtainable Under Rule 16.

The court below had before it only the very narrow issue whether it was proper for the instant subpoena to call for material which had been "obtained by Government counsel, in any manner other than by seizure or process." (R. 71), and which therefore could not have been obtained by an order under Rule 16. Any other question of the scope of the subpoena had been waived by the Government in the district court (R. 61, 62). Despite this fact, the Government now refers to the designation of the documents called for as a "dragnet" or "fishing expedition" (Br. in Opp. 14, 16). However, this point was not raised in the Government's motion to quash the subpoena (R. 72-73) or in the Statement of Points Relied Upon on Appeal (R. 103-104). Accordingly, the court of appeals refused to consider the form, or scope of designation, of documents in the subpoena, despite the Government's belated attempt to raise the question in its reply brief, and the Government is precluded from raising the point here. *United States* v. *Atkinson*, 297 U. S. 157; *Weade* v. *Dichmann, Wright & Pugh*, 337 U. S. 801; Robertson and Kirkham, "Jurisdiction of the Supreme Court of

the United States" (1936) § 389 (at pp. 781-782, 787), and cases cited.

The court below does, however, appear to have inadvertently departed from consideration of the effect of Rule 16 upon the subpoena power granted in Rule 17(c), since it observed (R. 132) that the action of the trial court created in Rule 17(c) "an almost unlimited right of discovery" and stated (R. 134) that Rule 17(c) "may not be converted into an unrestricted pre-trial discovery device." However, the holding of the court below is only that no documents beyond the reach of Rule 16, whether broadly or narrowly designated, may be inspected under Rule 17(c).

In any event, in *Brown* v. *United States*, 276 U. S. 134, 143, the Court held that subpoenas need only specify "with reasonable particularity the subjects to which the documents called for relate." As pointed out in *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 554, unless such a liberal rule is applied, one "would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the [party] * * * desiring the papers would probably rarely, if ever, have." Similarly, in *United States* v. *Burr*, 25 Fed. Cas. No. 14,694 (C. C. D. Va.), Chief Justice Marshall stated (at p. 191):

> "Now, if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents? * * * When a paper is in the possession of one party, it is completely in his power, and is required by the other, very strong reasons must be given to justify its being withheld, if it have any relation to the case."

And, as this Court noted in *Hickman* v. *Taylor*, 329 U. S. 495, 507, when considering the civil discovery rules:

> "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring

> into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."

These remarks apply even more plainly to criminal proceedings. See Berger and Krash, "Government Immunity from Discovery" (1950), 59 Yale L. J. 1451, 1453-54, 1456-60.

The issue as to the scope of the instant subpoena which was *not* waived by the Government in the trial court is the issue whether the subpoena could properly reach material in the prosecutor's custody although inspection of the same material under Rule 16 would not be permitted. If the Government is correct in its argument that no subpoena addressed to Government counsel under Rule 17(c) may call for documents not included within the discovery powers granted by Rule 16 (Br. in Opp. 6, 9, 10, 11, 12, 15, 16), no subpoena, however specific, could be issued for material obtained otherwise than by seizure or process and not obtained from or belonging to defendants. There is no correlation between the limitations of Rule 16 and the limitation now proposed by Government counsel to "particular identifiable objects of evidence" (Br. in Opp. 19-20). The Government's two arguments as to the proper limitations to be imposed upon the scope of Rule 17(c) are inconsistent, and the Government made its election between them when it waived all objections to the form of the subpoena in the trial court (see pp. 36-37, *supra*).

The limitations upon Rule 17(c) which are properly presented here by Government counsel are, as noted *infra* (p. 44), pertinent only to subpoenas addressed to the Government, because Rule 16 applies only to discovery against the Government.

The true objection to this subpoena is not to the source from which or the method by which the documents had been obtained; it is really to the fact that it was directed to an attorney for the Government. In essence, the Government's position is a direct descendant of the Crown's prerogative in ancient English common law, to conduct criminal trials as a game instead of as a serious search for the truth.[23] Such archaic notions have long since been abandoned in other forms of litigation; they have no proper place in contemporary administration of the criminal laws. Cf. *United States* v. *Coplon*, 185 F. 2d 629, 638 (C. A. 2). At bottom, the objection to the scope of the subpoena is thus a "privilege" argument. Indeed, in the district court the Government objected to the granting of this subpoena on the grounds that its description of the documents sought might include documents as to which the defense of "privilege" would be available. Thus, respondent Hotchkiss said in his statement refusing to comply with the subpoena (R. 86):

> "In addition, it is apparent, from the scope of designation of the aforesaid subpoena *duces tecum*, that it calls for the production of privileged documents, including, among others, documents which the Government *might* have secured from confidential and voluntary informants, and that the disclosure of such documents to defendants in criminal proceedings pursuant to subpoena issued under Rule 17(c) *would* be against public policy and would prevent and impede the Government in this and other criminal proceedings from securing from voluntary informants the benefits of their voluntary disclosure to the Government of information and documents relating to possible violations of the criminal statutes of the United States." (Italics supplied.)

It is submitted that the above contention provides the key to the argument advanced here by the Government.

23. See note 8, *supra*, p. 19.

Only because Government counsel consider themselves to be in some respects protected by the shield of public policy from the universal duty to divulge all relevant material to the courts to aid in the ascertainment of the truth or falsity of criminal charges do they place upon Rule 17(c) the narrow, strained, and altogether artificial interpretation which the court below endorses.

The rule of interpretation of Rule 17(c) for which the Government here prays would permit evasion of the Government's duty *to submit to the courts* the questions of privilege and public policy of protecting voluntary informants. By blocking all access to documents not obtained by seizure or process and not belonging to or obtained from defendants, on the ground that no Rule affords a procedure for obtaining them, the Government would effectively remove from the control of the courts the power to determine when and to what extent the privilege from discovery should attach.[24]

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24. Cf. *United States* v. *Cotton Valley Operators Committee*, 339 U. S. 940; *Marbury* v. *Madison*, 1 Cranch 137, 143-145, 166; *United States* ex rel. *Touhy* v. *Ragen*, 180 F. 2d 321 (C. A. 7) now pending here, No. 83, present Term; *United States* v. *Coplon*, 185 F. 2d 629, 638 (C. A. 2); *United States* v. *Andolschek*, 142 F. 2d 503 (C. A. 2); *United States* v. *Beekman*, 155 F. 2d 580 (C. A. 2); *United States* v. *Grayson*, 166 F. 2d 863 (C. A. 2); *United States* v. *Ebeling*, 146 F. 2d 254, 258-259 (C. A. 2; dissenting opinion of Judge Frank); *United States* v. *Watkins*, 67 F. Supp. 556 (S. D. N. Y.); *Bank Line* v. *United States*, 76 F. Supp. 801 (S. D. N. Y.); *Sorrentino* v. *United States*, 163 F. 2d 627, 629 (C. A. 9); *Crosby* v. *Pacific SS Lines*, 133 F. 2d 470, 475 (C. A. 9); *United States* v. *Krulewitch*, 145 F. 2d 76, 79 (C. A. 2); *Wilson* v. *United States*, 59 F. 2d 390 (C. A. 3); *United States* v. *General Motors Corporation*, 2 F. R. D. 528, 530 (N. D. Ill.); *O'Neill* v. *United States*, 79 F. Supp. 827 (E. D. Pa.); *Zimmerman* v. *Poindexter*, 74 F. Supp. 933, 934 (D. Hawaii); *Kentucky-Tennessee L. & P. Co.* v. *Nashville Coal Co.*, 55 F. Supp. 65 (W. D. Ky.); *United States* v. *Schine Chain Theatres*, 4 F. R. D. 109 (W. D. N. Y.); *United States* v. *American Solvents & Chemical Corporation*, 30 F. Supp. 107 (D. Del.); *Bowles* v. *Ackerman*, 4 F. R. D. 260 (S. D. N. Y.); *Walling* v. *Richmond Screw Anchor Co.*, 4 F. R. D. 265 (E. D. N. Y.); *Brewer* v. *Hassett*, 2 F. R. D. 222 (D. Mass.); *Fleming* v. *Bernardi*, 4 F. R. D. 270 (N. D. Ohio); cf. Taine, "Discovery of Trial Preparations in the Federal Courts" (1950), 50 Col. L. Rev. 1026, 1043-1044 and note 105.

The effect of this would not only be to protect all genuinely privileged documents from being subpoenaed and examined by the accused. It would also protect all documents from being subpoenaed which the Government had obtained either by covert means or by voluntary disclosure, whether or not they should properly remain undivulged. It would thus encourage Government's investigators to avoid seizure and process in obtaining evidence, and to resort to other, less overt, methods.

This case does not present the Court with the issue whether the documents described in the subpoena are privileged. The Government has at no time disclosed whether any of the documents which meet the description in the subpoena are, in its opinion, privileged. Neither has it described any of the documents being withheld from defendants, either openly or *in camera*, to the district court or the court below. In this connection, the Government never went beyond the Hotchkiss affidavit (cf. R. 130), which, as noted above, stated that a subpoena

> "calls for * * * among others, documents which the government *might* have secured from confidential and voluntary informants * * *" (R. 86). [Italics supplied.]

Moreover, Government counsel carefully avoided having recourse to the privilege argument in the court below, and it was not presented as a question in the petition for certiorari. The record affords no foundation for its determination.

4. A Subpoena under Rule 17(c) May Properly Be Addressed to an Attorney for the Government.

In holding that material which need not be produced under Rule 16 cannot be obtained under Rule 17(c), the court below in effect held that the instant subpoena could not properly be addressed to a prosecutor.

Neither the majority opinion nor the concurring opinion in the court of appeals mentioned the general policies which Rule 2 prescribes for interpretation of the whole system of the Criminal Rules. We submit that they failed to appreciate the destructive consequence upon the fair administration of criminal justice which, contrary to constitutional and common law principles, would result from prohibiting or imposing special restrictions on subpoenas *duces tecum* addressed to the prosecutor.

In the district court, the Government's main argument was that Rule 17(c) was inapplicable to the Government or its attorneys (R. 53-55, 94, 97). This point was abandoned in the Government's principal and reply briefs in the court below and in its brief in opposition here. At the oral argument below, Government counsel repeatedly conceded that Rule 17(c) applied to the Government (R. 134, note 1). Although Judge Major's concurring opinion holds that the word "person" in Rule 17(c) does not apply to the Government or its attorneys (R. 134, 136-137, 138), this highly technical construction has never been adopted by any of the courts which have considered Rule 17(c). This construction is refuted by the history of Rule 17(c), for the Advisory Committee's note on Rule 17(c) states that it is "substantially the same as Rule 45(b) of the Federal Rules of Civil Procedure." Rule 45(b), which also uses the term "person," has been construed to include the Government within the meaning of that term. *Bowles* v. *Ackerman*, 4 F. R. D. 260 (S. D. N. Y.); *Zimmerman* v. *Poindexter*, 74 F. Supp. 933, 934 (D. Hawaii); cf. *United States* v.

Yellow Cab Co., 338 U. S. 338, 341-342; *United States* v. *General Motors Corp.*, 2 F. R. D. 528 (N. D. Ill.).[25]

Judge Duffy's opinion, after reviewing the facts, opens his discussion of the legal problem with the statement (R. 131):

> "It is readily apparent that Rule 16, Federal Rules of Criminal Procedure, is restricted in its scope. A defendant in a criminal case faces sharply defined limitations in securing access to documentary material in the hands of prosecuting attorneys of the federal government."

Judge Duffy's opinion continues with his description of the limitations found in Rule 16 and his summary of the stages by which the Advisory Committee developed Rule 16 from one draft to another until it reached its present form. Only after completing that survey does Judge Duffy first consider Rule 17(c). The conclusion reached is summarized in the following sentence of the opinion (R. 132):

> "It does not make sense to have created in one rule a privilege of discovery limited to documents and papers belonging to the defendant or taken from others by seizure or process and at the same time to create

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25. The Advisory Committee's note on Rule 45(b) states that it "broaden[s] U. S. C., Title 28, § 636 (Production of books and writings) to include all actions and to extend *to any person*" (Italics supplied). Section 636 (28 U. S. C., 1940 ed.) was held to apply to production against the United States (*Third National Bank & Trust Co.* v. *United States*, 53 F. 2d 599 (C. A. 6); *United States* v. *Youngs*, 28 Fed. Cas. No. 16783 (10 Benedict 264) (S. D. N. Y.); *United States* v. *Hutton*, 26 Fed. Cas. No. 15433 (10 Benedict 268) (S. D. N. Y.)).

In *United States* v. *Burr*, 25 Fed. Cas. No. 14694 (C. C. D. Va.), Chief Justice Marshall held that pre-trial subpoenas *duces tecum* in criminal cases could be directed to the Government. He stated (at p. 191) that "The prosecutor is the representative of the government, and the government acts as a party through the agency of the attorney, who directs and manages the prosecution on behalf of government. If there be a paper ... the possession of the executive, which is not of an official nature, he must stand, as respects that paper, in nearly the same situation with any other individual who possesses a paper which might be required for the defence."

in Rule 17(c) an almost unlimited right of discovery by use of the subpoena provisions."

This interpretation discriminates between subpoenas addressed to non-parties, to defendants, or to co-defendants and subpoenas addressed to the prosecutor.

Rule 17(c) could be invoked, for example, in the following four situations: (1) where defendants seek documents from the prosecutor; (2) where the prosecutor seeks documents from the defendants; (3) where defendants seek documents from witnesses who are not parties, and (4) where the prosecutor seeks documents from witnesses who are not parties. Judge Duffy reads certain limitations into Rule 17(c) but he derives them only from Rule 16. Rule 16 applies only to the first of the four situations described above. To limit Rule 17(c) by inserting therein the restrictions found in Rule 16 would have no limiting effect in any of the last three situations described. Thus, Judge Duffy's opinion in effect holds that Rule 17(c) does not authorize certain types of subpoenas against the Government even though *identical* subpoenas would be upheld if the Government used them against defendants,[26] or if either party

26. The Court may wish to take judicial notice of the fact that in 1950, long before trial, the Government in a related criminal case, *United States* v. *Bowman Dairy Company, et al.*, 48 CR 361 (N. D. Ill.), employed Rule 17(c) to obtain considerable documentary evidence from one of the corporate petitioners herein. Judge Major's concurring opinion would foreclose the Government, after indictments, from pre-trial inspection of documentary evidence in the possession of defendants, because he holds that Rule 17(c) may not be employed against parties (R. 135-136, 138). The petitioners believe that Rule 17(c), when correctly construed, also authorizes the Government to use it for pre-trial inspection of documents in the possession of a corporate defendant, or, subject to personal privileges, in the possession of an individual defendant. Cf. *American Tobacco Co.* v. *United States*, 147 F. 2d 93, 116 (C. A. 6), affirmed, 328 U. S. 781. Even under the majority opinion below, the Government could not use Rule 17(c) for discovery purposes, because Rule 17(c) was construed as only providing "for the traditional type of trial subpoena" (R. 134).

used them against non-parties. This inequality of rights and duties would be one of the results of reading the qualifications of Rule 16 into Rule 17(c).

In addition to the plain language and the history of Rule 17(c), and the policy requirements of Rule 2, there are two further basic objections to the decision below that a subpoena under Rule 17(c) may not be addressed to an attorney for the Government unless limited to materials obtainable under Rule 16. First, heretofore in federal and state practice, subpoenas *duces tecum* have issued to compel prosecuting attorneys to produce materials which they have attempted to suppress or withhold (see pp. 52-65, *infra*, and Appendix. Production of such materials, if not privileged, has been required because it was important to the defendant and to the fair administration of justice irrespective of the source from which, or the means by which, the prosecutor had obtained them. No intention was expressed by those who drafted Rule 16 and Rule 17(c) to withdraw from defendants this important privilege which had long been theirs. Yet that would be the clear result if the decision below were allowed to stand. The second basic objection is that to adopt such a construction would curb the discretionary powers of the trial judge over the conduct of criminal proceedings to the extent that he would be prevented from minimizing the expense and delay of trials and from providing for the just and fair conduct of trials by requiring pre-trial inspection of crucial evidence.

5. Subpoenas Duces Tecum under Rule 17(c) Need Not Be Limited to Evidence Which Is to Be Used during the Trial.

Rule 17(c) and its history show that pre-trial inspection thereunder need not be limited "to evidentiary material which is to be offered at the trial by the party subpoenaeing it" (Br. in Opp. 13, 15-16). The opinions below do not discuss that point, for the Government first raised it here. Rule 17(c) provides for production and inspection "*prior to the trial or* prior to the time when they are to be offered in evidence" (italics supplied). The Government apparently infers from the phrase "when they are to be offered in evidence" that only documents which are to be offered in evidence may be inspected before the trial. This construction ignores the italicized clause above, including the disjunctive "or." Both the phrase "prior to the trial" and the word "or" establish a *time* standard; neither purports to limit the type of documents which may be inspected. The "books, papers, documents or objects designated in the subpoena" may be ordered produced for inspection either before the trial starts or after the trial has started.

Moreover, the construction which the Government urges would establish an impracticable standard for determining when a subpoena is proper. It would be almost impossible to limit the scope of a subpoena, even in a very simple case, to documents which will actually be introduced during the trial. Attorneys seldom can be sure that an item of evidence will be introduced until the very moment when its introduction is appropriate. A ruling of the court, a change in the direction of the opponent's strategy, an unexpected bit of testimony, or a number of other unpredictable factors may determine

whether particular items of evidence will be used. As Chief Justice Marshall stated in *United States* v. *Burr*, 25 Fed. Cas. No. 14694 (C. C. D. Va.), at pp. 191-192:

> "If the executive possess a paper which is really believed by the accused to be material to his defence, ought it to be withheld? The question will recur, is it really material to his defence? * * * *Until the course of the prosecution shall be fully developed, it may not be in the power of the accused to make a more positive averment. The importance of the letter to the defence, may depend on the testimony adduced by the prosecutor.*" [Italics supplied.]

He subsequently added (*ibid.*):

> "As to the use to be made of the letter, it is impossible that either the court or the attorney can know in what manner it is intended to be used."

It has recently been judicially noted that Rule 17(c) embodies the soundness of Chief Justice Marshall's ruling that a party is entitled to process of the court in obtaining any documents "which *may* be material" (court's italics). *Kelly* v. *United States*, 73 A. 2d 232, 234 (Mun. C. A. D. C., 1950). We know of no authoritative doctrine which would support the limitation of subpoena rights to documents actually to be introduced, or which would require the introduction of all documents subpoenaed. In fact, in *People* v. *Becker*, 210 N. Y. 274 (1914), one of the grounds for reversal and remandment for a new trial was the trial court's refusal to order the prosecutor to produce certain documents (described as "commissions") for defendant's inspection during the trial "unless counsel would agree to read the commissions in evidence" (210 N. Y. at p. 297). The same objections apply even more strongly to a requirement that documents subpoenaed before the trial

be offered. *State* v. *Bunk*, 63 A. 2d 842, 843-844 (Cy. Ct. N. J., 1949).[27]

Any subpoena *duces tecum* is in some respects a discovery mechanism, in that it brings in material which may or may not be introduced as evidence, depending upon its relation to the particular issues as they arise during the trial. Moreover, a trial court will ordinarily delay proceedings in progress sufficiently to permit parties and attorneys to inspect documents produced during trial in response to a subpoena *duces tecum*. Such cases as the instant one involve highly complex issues of fact and a large volume of documentary evidence and therefore require greater latitude in pretrial inspection than the usual case. (See notes 13, 14 and 16, *supra*, pp. 24, 26.)

Moreover, there are other important policy reasons for rejecting the Government's narrow view. Its adoption would prevent an accused from obtaining non-evidentiary material which might lead to exculpatory evidentiary material.[28] Such a construction would also permit a prosecutor to decide what is evidentiary and thus to produce for inspection only those documents which he might wish to disclose. Furthermore, it "presupposes an accurate

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27. It has frequently been held that the Government is under no obligation to call all of the witnesses which it subpoenas, and it would certainly follow from this that a party is under no obligation to offer in evidence all of the documents which it subpoenas. See *Jordan* v. *Bondy*, 114 F. (2d) 599, 604, note 3 (C. A. D. C.).

28. The Federal Rules of Civil Procedure permit the inspection of "relevant" documents, and it is not ground for objection that the documents would be inadmissible at the trial if they might lead to the discovery of admissible evidence. See Rules 34 and 26(b) of the Federal Rules of Civil Procedure. Moreover, the second draft of Rule 16 (then Rule 18) of the Criminal Rules required that the documents constitute "evidence in the proceeding", but this confining qualification was omitted in the final version of Rule 16. See Federal Rules of Criminal Procedure, Second Preliminary Draft (1944), p. 94.

knowledge of such papers [in the prosecutor's possession], which the [party] * * * desiring the papers would probably rarely, if ever, have." *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 554. Finally, the history of Rule 17(c) shows that it was not restricted to evidentiary material, for as pointed out by G. Aaron Youngquist, a member of this Court's Advisory Committee, the pre-trial feature of Rule 17(c) was to enable the subpoenaing party "to see whether he can use it [the subpoenaed material] or whether he wants to use it."[29]

6. No Basis Exists for Limiting Subpoenas Duces Tecum Under Rule 17(c) to Subpoenas Containing Ad Testificandum Clauses.

The Government apparently asserts (Br. in Opp. 12-13) that a command to produce documents under Rule 17(c) may only be a part of a subpoena to give testimony under Rule 17(a) and Judge Major took this position in his concurring opinion below (R. 135). This would mean that Rule 17(c) only permits a *duces tecum* clause to be used when it is added to an *ad testificandum* subpoena. The analysis is incorrect. It is well recognized that a subpoena may contain either an *ad testificandum* clause or a *duces tecum* clause, or both. The lack of an *ad testificandum* clause does not invalidate a subpoena *duces tecum*. *Wilson* v. *United States*, 221 U. S. 361, 372-374; *Essgee Company* v. *United States*, 262 U. S. 151, 157. Moreover, the Advisory Committee's notes to the preliminary and second preliminary drafts of Rule 17(c) point out that under Rule 17(c) "The production of books, papers, and documents may be required independently of testimony".[30]

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29. See Proceedings of the Institute on Federal Rules of Criminal Procedure (New York University School of Law, Institute Proceedings, Vol. VI, 1946), p. 168.

30. Federal Rules of Criminal Procedure, Preliminary Draft (1943), p. 107; Federal Rules of Criminal Procedure, Second Preliminary Draft (1943), p. 99. These notes are applicable to the final draft of Rule 17(c). See note 15, *supra*, p. 26.

See also the quotation from the *Burr* case at p. 59, *infra*.

II.

THE DISTRICT COURT'S INSPECTION ORDER IS BASED ON AMPLE PRECEDENT.

The court below did not concede, as does the Government (Br. in Opp. 19), that there is any common law privilege of addressing a subpoena *duces tecum* to a prosecuting attorney for production of documents. The opinion below asserts (R. 131):

> "It had been stated as a recognized rule of law that at common law a defendant had no right of discovery in criminal cases."

The opinion then interprets both Rule 16 and Rule 17(c) strictly, as if in derogation of common law. The opinion states (R. 134) that "Rule 17(c) provides for the traditional type of trial subpoena", evidently referring to the common law by use of the word "traditional." But if Rule 17(c) provides only for "the traditional type of *trial* subpoena", the Government would even lack specific authority to obtain documents for use in grand jury proceedings.

The opinion of the court below does not consider whether "the traditional type of trial subpoena" could be directed to a prosecuting attorney, or whether, if it could, it was "traditionally" limited in its allowable scope to documents which had been obtained from or had belonged to the defendant or had been obtained from others by seizure or process. The Government had conceded that the "traditional" trial subpoena could be addressed to the prosecutor, and was not limited to documents in those precise categories. The Government had merely recognized the valid common law precedents for the use of a subpoena to require the prosecutor to produce prior to trial documents outside of the confining limitations of Rule 16. However,

Judge Major's concurring opinion treats this recognition as an "ill-conceived admission" (R. 134, note 1). Judge Duffy overlooks the fact that the "traditional" subpoena *duces tecum* gave broader rights than does Rule 16. To interpret and apply Rule 17(c), the pertinent background is the common law, including the "traditional" as well as the statutory history of subpoenas *duces tecum*, rather than the history of Rule 16.

First, in its reply brief in the court of appeals, then in its oral argument there, and now in its brief in opposition, the Government has made an attempt to distinguish the instant case from the common law cases cited by petitioners. (See pp. 52-65 *infra*, and the Appendix.) The basis for the distinction cannot be that this subpoena is addressed to the prosecutor, because many of those were too. It cannot be that the documents sought by the instant subpoena were not obtained from or belonging to defendants or were not obtained from others by seizure or process. That standard first was developed by the draftsmen of Rule 16, and is not applied by the common law cases. The position which the Government now takes is that the common law cases involved "particular identifiable objects of evidence" (Br. in Opp. 19-20), whereas the instant subpoena is described as a "dragnet" or "fishing expedition" (Br. in Opp. 14, 16).

The majority opinion below holds that any form of pretrial inspection by defendants of documentary materials in the possession of the prosecution was a "startling innovation" (R. 131).[31]

31. The opinion relied (R. 131) on a statement by Dean Wigmore that "At common law no right of inspection of documents before trial was conceded to the accused" (6 Wigmore on Evidence (3rd ed., 1940) § 1859*g*). Petitioners do not urge that they have a right of inspection under Rule 17(c) but merely a privilege of inspection when, as here, the district court adjudges such an inspection to be warranted. Moreover, Wigmore's statement was referring to the early English common law, for he relied

The Government likewise relies on a supposed "lack of precedent in favor of pre-trial" inspection in criminal cases (Br. in Opp. 19). However, the district court's inspection order is supported by numerous precedents before and after the promulgation of the Federal Rules of Criminal Procedure. In fact, "most courts hold that they have the power, either inherently or by the application of, or by analogy to, the power they have by statute in civil causes, to order an inspection by accused before trial of documents or exhibits in the state's possession" (23 C. J. S. § 955).

A. The American Common Law Has Traditionally Authorized Trial Courts to Compel Prosecutors to Produce Evidence for Inspection by an Accused.

It is true that in a 1792 King's Bench decision, it was decided that pre-trial inspection of documents in criminal cases was not permissible at common law in England. *Rex* v. *Holland*, 4 T. R. 690, 100 Eng. Rep. 1248. However, within fifty years the English rule was liberalized.[32] In upholding

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solely on *Rex* v. *Holland*, 4 T. R. 690, 100 Eng. Rep. 1248 (1792) and *Commonwealth* v. *Jordan*, 207 Mass. 259 (1911). The *Holland* case no longer represents the English view (see pp. 52-53, *infra*, and Wigmore, *op. cit.*, § 1850), and the *Jordan* case held that it was within the discretion of the trial court to grant or refuse a motion to furnish the defendant, accused of murder, with a report of the autopsy on the victim (207 Mass. at pp. 264-265). Wigmore states that "considerations of fairness * * * call also for conceding the opportunity of inspection of documents" by an accused; he is highly critical of the early English rule (Wigmore, *op. cit.*, § 1859*g*; see also §§ 1845, 1850, 1859, 1863; 2 Bishop, New Criminal Procedure (2d ed., 1913) pp. 771-772).

32. *Rex* v. *Harrie*, 6 Carr. & Payne, 105, 172 Eng. Rep. 1165 (1833); *Reg.* v. *Spry*, 3 Cox C. C. 221 (1848); cf. *Attorney-General* v. *Newcastle-upon-Tyne Corporation*, [1897] 2 Q. B. 384, 395. In *Rex* v. *Gee*, [1936] 2 K. B. 442, convictions were quashed because, *inter alia*, the defendants were not furnished, prior to trial, with copies of the prepared typewritten statement used by the chief constable in examining them before the committing justices.

the claim of executive privilege in a recent civil case, the House of Lords recognized that the rule might be different in criminal cases. Thus, Viscount Simon stated as follows in *Duncan* v. *Cammell, Laird & Co., Ltd.* [1942], A. C. 624, 633-634:

> "The judgment of the House in the present case is limited to civil actions and the practice, as applied in criminal trials where an individual's life or liberty may be at stake, is not necessarily the same."

The Lord Chancellor explained the English common law rule as follows (at page 633):

> "Where the Crown is a party to a suit, therefore, discovery of documents cannot be demanded from it as a right, though in practice, for reasons of fairness and in the interests of justice, all proper disclosure and production would be made."

Moreover, "the modern [pre-trial] system in England is that an accused is not only permitted to see his confession, but the bulk of all of the evidence produced against him * * * without apparently producing any of the dire results expected or anticipated * * *." *State* v. *Haas*, 18 Md. 63, 71, 72 (1947).[33] Indeed, as explained by former Governor Whitman:

> "All of the evidence in the possession of the Crown is in the possession of the counsel for the defendant. He knows all that the Crown knows. He has all the

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The court remarked that "Before [the Act of] 1848 * * * it was not possible for a prisoner to obtain a copy of the depositions before trial" (2 K. B. at p. 445).

33. In the *Haas* case, the Court of Appeals of Maryland stated (188 Md. at p. 76):

> "We are not impressed by the fear of the prosecuting attorneys that the exercise of such [pre-trial inspection] discretion will change the whole practice of criminal law in this State, or will make the securing of proper convictions more difficult to obtain. It has not apparently had that effect elsewhere and we see no reason why it should have it here."

evidence in his possession before the witness goes on the stand. He has all the evidence that can be presented in that court at the trial before the trial begins."[34]

The American common law cases do not adhere to the early English view. In the leading case, *United States* v. *Burr*, 25 Fed. Cas. No. 14692d (C. C. D. Va.), Chief Justice Marshall pointed out that by necessary implication from the Sixth Amendment's guarantee of an accused person's right "to have compulsory process for obtaining witnesses in his favor," an accused was entitled to a subpoena *duces tecum* to obtain pre-trial inspection of documents that might be "material in the defence" (at pp. 33-35).

Even before adoption of the United States Constitution, courts of the American states had apparently departed from the concept of royal prerogative which, in the early English common law, had barred defendants' access to the Crown's evidence until the moment such evidence was introduced during the trial. Those early decisions of the State courts were referred to by Chief Justice Marshall (see 25 Fed. Cas. at p. 34) when he honored Aaron Burr's right to subpoena from the President of the United States, for pre-trial inspection,[35] certain letters deemed by Burr to be essential to his defense. In deciding that a subpoena

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34. Whitman, "The Administration of the Criminal Law," V New York City Bar Ass'n Lectures on Legal Topics (1928), p. 424. This statement appears in 6 Wigmore on Evidence (3rd ed., 1940) § 1850, pp. 394-395. Mr. Whitman had been District Attorney of New York County.

35. In *United States* v. *Burr*, 25 Fed. Cas. No. 14692d (C. C. D. Va.) Chief Justice Marshall held that subpoenas *duces tecum* may properly be issued prior to trial in criminal cases. He stated (at p. 33): "General principles, then, and general practice are in favor of the right of every accused person, as soon as his case is in court, to prepare for his defence, and to receive the aid of the processes of the court to compel the attendance of his witnesses."

duces tecum should be issued, the Chief Justice stated (25 Fed. Cas. at pp. 35, 38):

> "* * * it would seem to reduce his means of defence within narrower limits than is designed by the fundamental law of our country, if an overstrained rigor should be used with respect to his right to apply for papers deemed by himself to be material. * * * The court would not lend its aid to motions obviously designed to manifest disrespect to the government; but the court has no right to refuse its aid to motions for papers to which the accused may be entitled, and which may be material in his defence. These observations are made to show the nature of the discretion which may be exercised.
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> "It is believed that such a subpoena, as is asked, ought to issue, if there exist any reason for supposing that the testimony may be material * * *."

While the issue here arises under Rule 17(c) of the Federal Rules of Criminal Procedure, it involves the same basic principles of constitutional law which were applied in the cases of the early American period. In the interim, there have been innumerable occasions when courts in criminal cases have recognized that justice required them to permit defendants to have access before trial to evidence which the prosecutor attempted to withhold, and where appellate courts have held that the matter of pre-trial inspection rests in the judicial discretion of trial courts.[36]

36. Federal and territorial cases permitting access to the prosecutor's evidence include *United States* v. *Burr*, 25 Fed. Cas. No. 14,692d (C. C. D. Va.), at pp. 34-35, 37, 38; *United States* v. *B. Goedde & Co.*, 40 F. Supp. 53, 534 (E. D. Ill.); *United States* v. *Warren*, 53 F. Supp. 435, 436 (D. Conn.); *United States* v. *Rich*, 6 Alaska 670 (1922); see also *Edwards* v. *United States*, 312 U. S. 473, 481; *United States* v. *Coplon*, 185 F. 2d 629, 637-638 (C. A. 2); *Shores* v. *United States*, 174 F. 838, 844-845 (C. A. 8); *United States* v. *Beekman*, 155 F. 2d 580 (C. A. 2); *United States* v. *Grayson*, 166 F. 2d 863 (C. A. 2); *United States* v. *Dilliard*, 101 F. 2d 829, 837 (C. A. 2); *Asgill* v. *United States*, 60 F. 2d 776, 778-779 (C. A. 4); *Weinberg* v. *United States*, 126 F. 2d 1004 (C. A. 2); *Boehm* v. *United States*, 123 F. 2d 791, 807-808 (C. A. 8).

In *Edwards* v. *United States*, 312 U. S. 473, the trial court had overruled Edwards' motion filed before the trial to compel the Government to produce a transcript of his testimony before the Securities and Exchange Commission, although he asserted that production of it was necessary to prove that the prosecution was based in part upon sworn testimony which he had given under compulsion

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For state cases, see *Parsons* v. *State*, 251 Ala. 467, 476-477 (1948); *State* v. *Superior Court*, 39 Ariz. 242, 249-250 (1931); *Jones* v. *State*, 213 Ark. 863, 866 (1948); *Massie* v. *People*, 82 Colo. 205 (1927); *Daly* v. *Dimock*, 55 Conn. 579 (1887); *Padgett* v. *State*, 64 Fla. 389, 395-396 (1912); *State* v. *Burris*, 198 Ia. 1156, 1162 (1924); *People* v. *Gerold*, 265 Ill. 448, 469-471 (1914); *Trustees of Schools* v. *American Surety Co.*, 307 Ill. App. 398, 414 (1940); *Weer* v. *State*, 219 Ind. 217 (1941); *State* v. *Howland*, 100 Kan. 181, 185 (1917); *State* v. *Hinkley*, 81 Kan. 838, 846-849 (1910); *Wendling* v. *Commonwealth*, 143 Ky. 587 (1911); *State* v. *Dorsey*, 207 La. 928, 964-966 (1945); *State* v. *Lowery*, 160 La. 811 (1926); *State* v. *Bramhall*, 134 La. 1 (1913); *State* v. *Haas*, 188 Md. 63, 70-76 (1947); *Commonwealth* v. *Jordan*, 207 Mass. 259, 264-265 (1911); *Commonwealth* v. *Noxon*, 319 Mass. 495, 535 (1946); *State* v. *Naething*, 318 Mo. 531, 539-540 (1927); *State* v. *Tippett*, 317 Mo. 319, 325-327 (1927); *Cramer* v. *State*, 145 Neb. 88, 94-96 (1944); *Hameyer* v. *State*, 148 Neb. 798 (1947); *Matter of Hughes* v. *Kings County Court*, 181 N. Y. Misc. 668, 672-673 (1943); *People* v. *Gatti*, 167 N. Y. Misc. 545 (1938); *Matter of Attorney General of United States*, 160 N. Y. Misc. 533 (1936); *People* v. *Rogas*, 158 N. Y. Misc. 567 (1936); *People* v. *Wargo*, 149 N. Y. Misc. 461, 463-464 (1933); *People* v. *Kresel*, 142 N. Y. Misc. 88 (1931); *People* v. *Radeloff*, 140 N. Y. Misc. 690 (1931); *People* v. *Bellows*, 1 How. Pr. N. S. 1849 (N. Y. O. & T., 1884); *State* v. *Cala*, 35 N. E. 2d 758, 760-761 (Ohio Ct. of Apps. 1940); *State* v. *Circuit Court of Minnehaha County*, 60 S. D. 115, 117-120 (1932); *Jenkins* v. *State*, 45 Tex. Cr. R. 173, 176 (1903); *State* v. *Payne*, 25 Wash. 2d 407 (1946); *State* v. *Clark*, 21 Wash. 2d 774, 778 (1944); *State* v. *Morrison*, 175 Wash. 656, 658 (1933); see also Note, 7 Fordham L. Rev. 449 (1938).

For cases dealing with inspection during trial see, *e. g.*, *State* v. *Guagliardo, et al.*, 146 La. 949 (1920); *People* v. *Buzan*, 351 Ill. 610, 618 (1933); *State* v. *Murphy*, 154 La. 190, 203 (1923); *Sprinkle* v. *State*, 137 Miss. 731, 732-733 (1925); *People* v. *Becker*, 210 N. Y. 274 (1914); *People* v. *Schainuck*, 286 N. Y. 161 (1941); *People* v. *Walsh*, 262 N. Y. 140, 149-150 (1933); *People* v. *Miller*, 257 N. Y. 54, 57, 58-59 (1931); *People* v. *Jackson*, 182 N. Y. 66, 81-82 (1905); *Application of Heller*, 184 N. Y. Misc. 75 (1945); *Coloniger* v. *State*, 91 Tex. Cr. R. 143, 146 (1922); *Mohler* v. *Commonwealth*, 132 Va. 713, 720 (1922).

of subpoenas *duces tecum* after claiming immunity. Edwards had entered a plea in bar, based upon the applicable immunity statute (15 U. S. C. § 77v (c)).

This Court held (p. 481) that the transcript should have been produced, or at least that the trial court should have exercised its discretion to issue an order to show cause why all or a part of the transcript should not be produced. The constitutional privilege against self-incrimination was basic to the inspection issue in the *Edwards* case (312 U. S. at pp. 475-477, 480-482).

If the *Edwards* case arose today, Rule 16 would not permit Edwards to obtain the transcript because it was not obtained from him and did not belong to him, and the prosecutor had received it voluntarily from the S. E. C., rather than by seizure or process. Moreover, the decision in the instant case, requiring that Rule 17(c) be confined to the scope of Rule 16, would prevent the district court from issuing a subpoena *duces tecum* to compel production of the transcript.

The *Edwards* case was followed in *Boehm* v. *United States*, 123 F. 2d 791 (C. A. 8), where the court stated (pp. 807-808):

> "Whenever it is timely presented to the court by a defendant in a criminal case that the transcripts of testimony of government witnesses against him given before investigators contain evidence material to his defense at the trial, and demand is made therefor, *the court should issue process for the production thereof* and should examine the same and should make its rulings as to admissibility or use in the trial of any part of the whole matter in the light of the transcripts before the court. In making such rulings the court is bound to exercise sound judicial discretion to accord the defendant the fair trial to which he is entitled and at the same time to confine the procedure to consideration of competent, relevant and material

evidence. In failing to adhere to that course in this case, and in refusing absolutely to take any steps to compel production of the demanded transcripts, the trial court was in error; * * *." [Italics supplied.]

In the *Boehm* case, too, Rule 16 would not have applied, since the material sought consisted of narrative statements made by government witnesses to government investigators, and therefore Rule 17(c) would not apply either, if interpreted as containing the limitations of Rule 16, as it was by the court below.

The limitations which the court below would impose upon the common law powers of the trial judge are not founded upon common law precedents.[37]

The common law powers of trial courts to compel disclosure of evidence to defendants were not confined to witnesses other than attorneys for the State. In virtually all of the cases in the Appendix hereto defendants were permitted to examine documents or other relevant materials which were in the possession or control of the attorney for the State, or the trial court's discretionary power to permit such inspection was recognized.

Nor were the trial court's powers to compel the prosecution to disclose relevant material confined to material belonging to defendants, obtained from defendants, or obtained from others by seizure or process. Cases appearing in the Appendix, in addition to the *Burr, Edwards,* and *Boehm* cases, went outside of those categories. In fact, the sole basis for that limitation appears to be the language of Rule 16, and that language bears no relation whatever to the common law authorities.

It is reiterated again and again in the common law cases that a court's power to compel disclosure of material by

37. The sole possible exception is the Government's contention that material to be inspected before the trial must be material which is to be introduced during the trial. That proposed limitation, however, is completely inconsistent with the plain language and history of Rule 17(c) and the general policy of the Criminal Rules as shown, *supra*, pp. 46 to 49.

the prosecution is discretionary, and is inherent in the nature and function of the court, being exercisable as a matter of judicial grace. As was said in *United States v. Burr*, 25 Fed. Cas. No. 14,692d (C. C. D. Va.) (at p. 32).

> "The genius and character of our laws and usages are friendly, not to condemnation at all events, but to a fair and impartial trial; and they consequently allow to the accused the right of preparing the means to secure such a trial."

Three constitutional bases underlie the legal principles upon which courts have proceeded in granting such discovery rights to the accused. The first and more general is the requirement of the Sixth Amendment that the accused be "informed of the nature and cause of the accusation." The second is the provision in the Sixth Amendment that the accused shall "have compulsory process for obtaining witnesses in his favor." As Chief Justice Marshall said in the *Burr* case (25 Fed. Cas. No. 14,692d (C. C. D. Va.) at pp. 34-35):

> "A subpoena *duces tecum*, then, may issue to any person to whom an ordinary subpoena may issue. * * * *This court would certainly be very unwilling to say that upon fair construction the constitutional and legal right to obtain its process, to compel the attendance of witnesses, does not extend to their bringing with them such papers as may be material in the defence.* The literal distinction which exists between the cases is too much attenuated to be countenanced in the tribunals of a just and humane nation. If, then, the subpoena be issued without inquiry into the manner of its application, it would seem to trench on the privileges which the constitution extends to the accused; it would seem to reduce his means of defence within narrower limits than is designed by the fundamental law of our country, if an overstrained rigor should be used with respect to his right to apply for papers deemed by himself to be material." [Italics supplied.]

The third constitutional basis for Rule 17(c) is the due process clauses of the Fifth and Fourteenth Amendments.

Cases requiring pre-trial inspection of material in the prosecutor's possession on constitutional grounds appear at pp. 2, 7 and 11 of the Appendix hereto.

As shown, the Constitution and the American common law furnish the origin of Rule 17(c). Section 14 of the Judiciary Act of 1789 (now 28 U. S. C. 1651(a))[38] is another precedent for Rule 17(c) and is an additional authority for the district court's order. That Section conferred upon the federal courts the power to issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the practice and usages of law. It was construed in *American Lithographic Co.* v. *Werckmeister*, 221 U. S. 603, 609, as comprehending "the authority to issue subpoenas *duces tecum*, for 'the right to resort to means competent to compel the production of written, as well as oral, testimony, seems essential to the very existence and constitution of a court of law.'" This provision is applicable to subpoenas *duces tecum* in criminal proceedings (*Weinberg* v. *United States*, 126 F. 2d 1004, 1008 (C. A. 2)) and empowers a federal court "to issue subpoenas *duces tecum* for purposes of pre-trial discovery," especially where, as here, the issues are "complicated or extensive" so that "pre-trial discovery is necessary to a prompt and satisfactory trial of the issues." *Bethlehem Shipbuilding Corp.* v. *National Labor Relations Board*, 120 F. 2d 126, 127 (C. A. 1).[39] Thus the American common law, the Fifth

38. 28 U. S. C. § 1651(a) provides as follows: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

39. The *Bethlehem* case apparently involved a civil contempt, and the court referred to the Federal Rules of Civil Procedure by way of analogy. However, the above-quoted language was not an interpretation of the Civil Rules, but of Section 377 of the Judicial Code (28 U. S. C. 1651 (a)), which applies to criminal cases as well as to civil actions. *United States* v. *Smith*, 331 U. S. 469; *Ex parte United States*, 287 U. S. 241; *United States* v. *Mayer*, 235 U. S. 55; *Weinberg* v. *United States*, 126 F. 2d 1004, 1008 (C. A. 2).

and Sixth Amendments, and Section 1651 (a) of the new Judicial Code, as well as Rule 17(c), empowered the district court to enter the instant order.

In spite of the common law authorities, the fundamental principles embodied in the Fifth and Sixth Amendments, and 28 U. S. C. 1651(a), Government counsel have argued that the subpoena *duces tecum* powers granted to the federal district courts by Rule 17(c) must be construed strictly by reading into the Rule the restrictions found in Rule 16. That argument can be summed up as a contention that the confined and crippled remnants of Rule 17(c), containing the qualifications of Rule 16, specify no procedure at all for use of subpoenas *duces tecum* for discovery against the Government prosecutor in a situation such as this.

If such is to be the fate of Rule 17(c), however, even this would not result in invalidation of the subpoena involved in this case. On the contrary, Rule 57(b) of the Federal Rules of Criminal Procedure expressly provides that matters as to which the Rules are silent shall be proceeded with "in any *lawful* manner *not inconsistent with these rules* or with any applicable statute". The subpoena in this case is *lawful* at common law, under 28 U. S. C. 1651(a), and under the Fifth and Sixth Amendments. Rule 16, as noted above (pp. 29-36), *is not inconsistent* with the common law, but is merely supplementary thereto in providing a restraint upon the prosecution, which complements the benefits to the accused provided by Rule 17(c). Moreover, the limitations of Rule 16 are not constitutional if they mark absolute limits to, and thereby deprive defendants in criminal cases of their rights under, the Fifth and Sixth Amendments. Cf. *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401. Hence, if Rule 17(c) is to be interpreted as containing the limitations found in

Rule 16,[40] the instant subpoena should be upheld as proceeding in a "lawful manner" with regard to a matter as to which "no procedure is otherwise specifically prescribed by rule," within Rule 5. (b).

The American common law cases permitting inspection were sometimes complementary to the indictment and bill of particulars. In this case, the district court had previously denied petitioners' motions to dismiss the indictment as excessively vague and indefinite (R. 117). In addition the court had, except to a very limited extent, denied the defendants' motions for a bill of particulars at the very time that it denied the Government's motion to quash this subpoena (R. 75). Thus, the instant order, just as in some of the foregoing American common law cases,[41] was designed to insure that defendants be properly informed of the factual issues.

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40. The court below held that Rule 16 "expressly prohibited" discovery and inspection of broad scope (R. 132). This is incorrect; the Rule merely establishes express limits to its own application. It certainly does not "expressly prohibit" use of other rules, statutes, or common law procedures for discovery purposes.

41. The Government evidently relies upon *People* ex rel. *Lemon* v. *Supreme Court*, 245 N. Y. 24 (1927) (Br. in Opp. 18, note 12). However, Chief Judge Cardozo there stated (at pp. 29, 32, 33):

> "No precedent can be found even in civil causes for compelling disclosure, in advance of the trial, of the office notes or memoranda prepared by an attorney after consultation with his witnesses, and summarizing his understanding of the testimony that is likely or expected.
>
> * * * * *
>
> "The decision of this case does not require us to affirm or deny the existence of an inherent power in courts of criminal jurisdiction to compel the discovery of documents in furtherance of justice.
>
> * * * * *
>
> "We leave the question open, for if the power exists at all this case is not within it. The most that can be argued with any show of reason in behalf of the defendant is that the remedy of inspection in civil cases is to be applied *in consimili casu* to criminal prosecutions. The power in criminal prosecutions may not improbably be less."

It is interesting to note the observations of Judge Medina concerning a similar point in a civil antitrust proceeding:

> "I am going to find some way, whether by these interrogatories or some equivalent process, of advising the Government at some appropriate time to disclose to these defendants, to each of them, just exactly what they are charged with. * * * There is no use of our fussing about as to whether we call it a bill of particulars or call it answers to interrogatories.
>
> * * * * * *
>
> "What I am concerned about is seeing to it that when these defendants go into this trial they will know exactly what they have to meet factually, and that is what I think they are entitled to in some way or another" (Hearings in *United States* v. *Henry S. Morgan*, No. 43-757 (S. D. N. Y., October 30, 1947), as quoted in McAllister "The Big Case: Procedural Problems in Antitrust Litigation" (1950), 64 Harv. L. Rev. 27, 31-32).

These observations apply *a fortiori* to a criminal proceeding in view of the guarantees of the Fifth and Sixth Amendments. As Judge Learned Hand pointed out in *United States* v. *Coplon*, 185 F. 2d 629, 637-638 (C. A. 2):

> "If the prosecution had not had the records and had been obliged to rely upon the testimony of the 'monitors,' it would certainly have been constitutionally necessary under the Sixth Amendment to ex-

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In a subsequent case, Judge Cardozo explained that pre-trial inspection was denied in the *Lemon* case because the documents were "the private memoranda of the prosecuting officer" (*People* v. *Müller*, 257 N. Y. 54, 59 (1931)), comparable to the work product of an attorney, involved in *Hickman* v. *Taylor*, 329 U. S. 495, and expressly excluded from the instant subpoena. See also the New York decisions cited in note 36, *supra*, pp. 55-56. Wigmore criticizes the *Lemon* case as "accepting impotently the view that the Judiciary must wait on the Legislative for doing justice in such cases." 6 Wigmore on Evidence (3rd ed., 1940) § 1850, p. 395.

amine them openly and in court; * * * Unless therefore there is some excuse which will toll this constitutional privilege it appears irrefragably demonstrable that the suppressed records were incompetent.

"* * * the refusal to allow the defence to see them was, as we have said, a denial of their constitutional right, and we can see no significant distinction between introducing evidence against an accused which he is not allowed to see, and denying him the right to put in evidence on his own behalf. *Back of this particular privilege lies a long chapter in the history of Anglo-American institutions. Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens.* All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. *But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism.*"[42]

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42. Similarly, Judge Frank remarked in his dissenting opinion in *United States* v. *Ebeling*, 146 Fed. 254, 258-259 (C. A. 2):

"It has been suggested that because the Krulewitch doctrine diminishes the value of the privilege on which the government relies, that doctrine should be restricted. But I believe that that privilege should be curtailed, for otherwise it gives sustenance to the general notion that the government, in prosecuting a citizen, should be zealously protected by the courts from disclosing to him evidence which it has gathered in preparing for trial and which may aid him in convincing a jury of his innocence. That notion is at variance with the basic principles of our form of government. Thus the Canon of Ethics of the American Bar Association states: 'The primary duty of a lawyer engaged in a public prosecution is not to convict but to see that justice is done. The suppression of facts * * * capable of establishing the innocence of the accused is

The decision of the court below contravenes the policies of the Fifth and Sixth Amendments, of the American common law decisions, and of the Federal Rules of Criminal Procedure, which are to further the interests of justice and fairness by affording due notice to defendants of the charges against them and enabling them to prepare their defense.

B. Judicial Interpretations of Rule 17(c) Support the Views Adopted by the Trial Court.

In *United States* v. *Bondy*, 171 F. 2d 642, the Court of Appeals for the Second Circuit held that a district court has jurisdiction under Rule 17(c) to order an attorney for the Government to produce before trial, for inspection by defendants, documents which would not have been subject to a motion for discovery under Rule 16.

District Judge Bondy had ordered the United States Attorney in the proceeding of *United States* v. *Littell and Marks* (Case No. C127-420, S. D. N. Y.) to produce documents subpoenaed under Rule 17(c), including documents

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highly reprehensible.' As the Wisconsin Supreme Court has said, 'The district attorney is a quasi judicial officer. * * * "A prosecutor should act not as a partisan eager to convict, but as an officer of the court, whose duty it is to aid in arriving at the truth in every case." * * * "His object, like that of the court, should be simply justice. * * *"' Said the Supreme Court, 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interests, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer.' He should not try and no court should, I think, assist his efforts, to shut out scrutiny of evidence such as the witness' statement here, which may turn out to be 'pregnant with importance in ascertaining the truth.'" [Citations omitted.]

not obtained from or belonging to defendants and not obtained from others by seizure or process, although such documents could not have been included in a discovery order under Rule 16. The Government sought a writ of mandamus from the court of appeals to direct Judge Bondy to vacate the order. As in the instant case, the Government argued that Rule 17(c) granted the trial judge no authority to require pre-trial production of the documents subpoenaed, because of the limitations of Rule 16. The court of appeals held (171 F. 2d at p. 644):

> "So much of the order [of the District Court] as directs production of the documents designated in the subpoena is authorized by Rule 17(c). The most that can be urged is that the order was so sweeping as to amount to an abuse of discretion; it did not deal with matters beyond the court's jurisdiction."[43]

The court rejected the argument advanced here, that the limitations of Rule 16 must be read into Rule 17(c), and held that it is within a district court's jurisdiction and discretion to permit pre-trial inspection of documents under Rule 17(c), although they could not be inspected pursuant to Rule 16. The court also rejected arguments like those made here as to the scope of the subpoena and the designation of the material subpoenaed. In contrast to the decision below, the *Bondy* decision is consonant with the language and history of Rule 17(c) and with the liberal purposes of the Criminal Rules.

Pre-trial inspection subpoenas have been granted against the Government under Rule 17(c) in *United States* v. *Littell and Marks, supra,* Case No. C127-420 (S. D. N. Y., orders of October 30, 1948 and May 16, 1949); *United States* v. *Hiss,* Case No. C128-402, (S. D. N. Y., unreported opinion of November 10, 1949); and the instant case (R. 69-

43. The question whether the district court abused its discretion in the instant case was not raised in the court below (R. 139).

70); and cf. *Kelly* v. *United States*, 73 A. 2d 232, 234 (Mun. C. A. D. C., 1950). In *State* v. *Bunk*, 63 A. 2d 842 (Cy. Ct. N. J., 1949), Rule 2:5-8(c) of the New Jersey Rules of Criminal Practice, which is identical to Rule 17(c), was construed as authorizing pre-trial inspection by defendants of records of a state reformatory and a state penitentiary, and of a murder weapon. The narrative statements which were withheld from examination were comparable to those excluded from the subpoena in the instant case (see material in parentheses in second sentence of subpoena, p. 5, *supra*, and R. 71).

The fact that three judges of district courts have exercised their discretion by denying subpoenas[44] does not show that the Rule itself is unreasonable unless interpreted as if its language incorporated that of Rule 16. The fact that three other District Judges and the Court of Appeals for the Second Circuit have approved subpoenas under the Rule, all of which went beyond the limits of Rule 16 with no disastrous results, is significant. Far more significant, of course, are the plain, adequately safeguarded language of Rule 17(c), its history, and the principles of enlightened policy, constitutional liberty, and common law fairness which both explain and justify the action of the trial court.

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44. *United States* v. *Maryland & Virginia Milk Producers Association*, 9 F. R. D. 509 (D. D. C.); *United States* v. *Brumfield*, 85 F. Supp. 696 (W. D. La.); *United States* v. *Hiss*, 9 F. R. D. 515 (S. D. N. Y.). Of these cases, only the *Brumfield* case took the position that Rule 17(c) should be limited by Rule 16. In that case, the court also gave the grand jury privilege and prematurity as reasons for denying the remedy sought. The *Hiss* and *Maryland & Virginia Milk* cases were decided on the bases of privilege, prematurity and broadness of the subpoenas, none of which is an issue here. In addition, the motion to quash the subpoena in the *Hiss* case was granted largely because of the *ex parte* nature of Judge Conger's order (9 F. R. D. at p. 516), whereas the order involved here was not entered *ex parte*.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX.

This appendix comprises excerpts from opinions in thirty-five criminal cases concerning an accused's privilege of pre-trial inspection of materials in the prosecutor's possession or control. In most of these cases, inspection was permitted or the reviewing court reversed a trial court's denial of inspection. In other cases, the opinions point out that whether or not to permit pre-trial inspection is a matter of discretion for the trial court.

In cases marked*, it is not clear from the opinion that inspection was sought prior to trial. In those marked ‡, the decisions were based in part upon statute.

United States v. *B. Goedde & Co.*, 40 F. Supp. 528, 534 (E. D. Ill.):

> "Defendant Mildred Draper moves to have returned to her certain documents so that she may adequately prepare for trial. The Government resists the motion and moves that the paper be impounded. Obviously the rights of each will be fully protected if the papers are impounded in the Clerk's Office and each party allowed access thereto. The motion for the return of the documents will be denied. The cross motion to impound them with the Clerk is allowed, provided, however, that either party may examine them in the presence of a Deputy Clerk or other representative of the Government."

United States v. *Warren*, 53 F. Supp. 435, 436 (D. Conn.):

> "The nature of the evidence sought to be inspected

here seems to raise no serious possibility of either of the dangers guarded against, tampering with witnesses or fabrication of evidence by the defense. * * * Refusal of inspection might well create a situation in which fairness would require adjournments or delays in the course of trial.

"The motion for permission to examine the evidence enumerated is granted. * * *"

Parsons v. *State*, 251 Ala. 467, 476, 477 (1948):

"*We think that due process* would relieve any confidential nature of the proposed evidence, such as applies to the department agents, and *would demand its allowance as evidence.* This principle applies, as we have shown, to the matter of disclosing the name of an informer when it is material to the proper disposition of the case."

* * * * *

"We think the court should have granted the timely motion to request the Attorney General of the United States to release the evidence * * *."

United States v. *Rich*, 6 Alaska 670, 671-672 (1922):

"The whole purpose of a law trial, criminal or civil, is to ascertain the truth. No unfair handicap is imposed upon either party by allowing the other to have full knowledge of inanimate objects intended to be used in evidence. * * * The law of English-speaking states nearly everywhere provides by statute or long precedent for the inspection of written documents. * * * The reason seems to me to be fully as strong in criminal cases. * * * Inspection by the defendant before trial merely offers him the means of showing, if he can, that the prosecution's theory is wrong."

* * * * *

"In the case at bar, the prosecution expects to prove by expert testimony that finger-prints on the glass in question are those of defendant. *He cannot have a*

*fair trial without having reasonable opportunity to show—if he can—by expert testimony that the finger prints were not made by him; * * * This cannot be done at a moment's notice.''* (Italics supplied.)

State v. *Superior Court*, 39 Ariz. 242, 249 (1931):

"The question has frequently been before the courts as to whether a defendant in a pending case may compel the state to furnish him with a list of the latter's witnesses or be given the opportunity to inspect articles to be used in evidence. It has been held that in the absence of some special reason why the request should be granted, it is not error for the court to refuse such request. [Citing cases.] But it is also held that *where justice and a fair interpretation of the law require that such inspection be granted, it should be allowed.* [Citing cases.]

"We are of the opinion that *such a rule is in the interest of justice,* and that *it is left to the sound discretion of a trial court* when a proceeding is pending therein as to whether such inspection and examination should be allowed or not, and the same rule would apply to inspection of premises, as in this case." (Italics supplied.)

Jones v. *State*, 213 Ark. 863, 866 (1948):

"We see no reason why this request was not granted, in fact, we think it should have been, but we cannot say that this was such prejudicial error as calls for the reversal of the judgment. Copying the confession would have furnished no evidence that it was not freely and voluntarily made."

Massie v. *People*, 82 Colo. 205, 217 (1927):

"If, under any circumstances, the motion was good *its allowance seems clearly discretionary, reviewable only for gross abuse* and none such is disclosed." (Italics supplied.)

‡ *Daly* v. *Dimock*, 55 Conn. 579, 589, 590 (1887):

"The argument that the writ ought not to be granted because it is the indicted party who asks for it is not a very weighty one. *The law presumes every man to be innocent until the contrary appears;* and *its policy is to give every man accused of crime a reasonable opportunity to prepare and present to a jury his defense.* The state does not desire to procure convictions by any unfair concealment or surprise. It concerns itself quite as much in having the innocent acquitted as in having the guilty convicted. While it affords every reasonable facility for the prosecution of offenders, it is no less solicitous to give every accused person a fair and reasonable opportunity to make his defense."

* * * * *

"* * * But it is said that the writ is not demandable as a matter of right, but is awarded in the discretion of the court. *It is doubtless true that in many cases the court will exercise its discretion. The court however will not refuse the writ where the relator has a clear legal right,* there is a substantial matter involved, and there is no other adequate remedy. In this case, as we have seen, the relator has a clear legal right." (Italics supplied.)

Padgett v. *State*, 64 Fla. 389, 396 (1912):

"* * * *The matter rests in judicial discretion,* and this discretion will be reviewed only for the purpose of ascertaining if the defendant was in fact surprised. * * * It is sufficient to say that a careful examination of the transcript, aided by the briefs * * * fails to show any abuse of the discretion vested in the trial judge, or that the defendant was surprised or harmed in any way by such ruling, * * *." (Italics supplied.)

People v. *Gerold*, 265 Ill. 448, 470 (1914):

"Had the plaintiff in error had an opportunity of examining, under proper conditions, these various documents, it is possible that he could have obtained positive evidence as to the payment of the money to the proper persons. *The whole theory of our law as to the trial of one accused of crime is to give him an opportunity to know the charges against him, so that he can make proper investigation and preparation for the trial.* We see no reason why the motion of plaintiff in error on this point should not have been granted by the trial court." (Italics supplied.)

Trustees of Schools v. *American Surety Co.*, 307 Ill. App. 398, 414 (1940):

"* * * If appellants' motion had been made in apt time and had it disclosed a refusal by appellees to permit this appellant to examine the books and records of the school treasurer, the court undoubtedly would have protected appellants' interests and if it had not, this appellant would them [*sic*] be in a position to complain."

‡ *Weer* v. *State*, 219 Ind. 217, 228 (1941):

"* * * There is a lack of harmony in the decisions as to the right of an accused to the inspection and disclosure of evidence in the possession of the prosecution. * * * We find it unnecessary, however, to look beyond the statute. * * * *The right to have a production of papers* under our statute is not an absolute one, but *is addressed to the sound discretion of the court.*" (Italics supplied.)

‡ *State* v. *Hinkley*, 81 Kan. 838, 847-848 (1910):

"We agree with counsel for appellant that in common fairness they should have been permitted before going to trial to inspect the transcript of the testimony taken at the coroner's inquest. It is a record which

the law requires to be filed in the office of the county clerk * * *, and which the appellant and his counsel had as much right to examine as counsel for the state. * * * *It is doubtful if any excuse can be urged for depriving him of the right to inspect such a record, unless it be founded in the mistaken notion of the rights of a person accused of crime and the relations which the state bears toward such a person. The state is never interested in the conviction of an innocent person, but, on the contrary, is interested in his acquittal.* * * * [The prosecuting attorney] should refrain from doing anything unfair or prejudicial to the rights of the accused to a fair trial. *The prosecutor's duty to the state did not require him to withhold evidence which the accused in justice is entitled to the benefit of,* nor justify him in treating the accused unfairly in the argument or in remarks made in the presence of the jury." (Italics supplied.)

Wendling v. *Commonwealth*, 143 Ky. 587, 599 (1911):

"* * * We are not prepared to say that the court abused a *sound discretion* in refusing this request." (Italics supplied.)

State v. *Bramhall*, 134 La. 1, 2-3 (1913):

"His defense being that the liquors sold by him were nonintoxicating, he called upon the prosecution to furnish him a sample of the liquor which it claimed he had sold, in order that he might have it analyzed. If this request had been made in a sincere effort to establish the truth, its refusal would have been error, if it was in the power of the prosecution to comply with it. The guilt or innocence of the accused depending upon whether the liquor is intoxicating or not, it stands to reason that he is entitled to have it analyzed, and is entitled to have a sample of it for that purpose if within the power of the prosecution to give it."

State v. *Dorsey*, 207 La. 928, 964, 966 (1945):

"*Every defendant in a criminal case is presumed to be innocent until the contrary appears, and it is the policy of the law to give to every man accused of a crime a reasonable opportunity to prepare and present his defense to the court or the jury.* The State of Louisiana does not want to secure convictions by any unfair concealment or surprise. It is the duty of the State to concern itself as much in having the innocent acquitted as in securing the conviction of the guilty, and the State is desirous of giving every accused person a fair and reasonable opportunity to make his defense. This being so, we are of the opinion that a pre-trial inspection of defendant's own confession is a just and fair concession which should be made in this State."

* * * * *

"*Under the provisions of the Constitutions of the United States and this State, every accused is entitled to, and is guaranteed a fair trial, and to deny his counsel a pre-trial inspection of accused's written confession is,* in our opinion, *tantamount to depriving such accused of a fair trial,* and is *in violation of his constitutional rights.* This being so, Section 976 of the Revised Statutes must yield in so far as it may deny this right." (Italics supplied.)

State v. *Lowery*, 160 La. 811 (1926):

"The alleged whisky was at all times in the possession of the state, and no valid reason has been given why it could not have been produced in open court when the motion was filed, in order that defendant might have it analyzed. In such a proceeding, the case for the prosecution could not have been injured since, if the liquid was actually whisky, the analysis would have confirmed that fact. On the other hand, it was an essential element of appellant's defense to demonstrate, if he could do so by an analysis, that the alleged intoxicant was not whisky."

State v. *Haas*, 188 Md. 63, 75-76 (1947):

> "* * * *the tendency in the courts of this country is to permit discretion in the trial judge.* The argument made against any such discretion is based upon a fear that the State, which is charged with the prosecution of crime, may be hampered in its duty by the disclosure of its evidence to those charged with offenses. Whatever merit that argument has as applied to a situation where it is contended that the accused has a *right* (court's italics) to inspect the evidence, it has no application, we think, to a situation where the trial judge in each case and on each application, determines what should be done in the interest of justice.
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> * * * * *
>
> "It is our conclusion that such an application as the one we are now considering should be left to the discretion of the trial court, not to an unlimited discretion but to a discretion subject to review if abused. * * * We are not impressed by the fear of the prosecuting attorneys that the exercise of such discretion will change the whole practice of the criminal law in this State, or will make the securing of proper convictions more difficult to obtain. * * * On the other hand, there seems to be a measure of *elemental justice* in permitting one accused of crime to see a confession alleged to have been made by him, which he expects to be produced against him at this trial. * * *" (Italics supplied.)

Commonwealth v. *Noxon*, 319 Mass. 495, 535 (1946):

> "The judge did not err in these matters. It was within his *discretion* to grant or deny the motions." (Italics supplied.)

Commonwealth v. *Jordan*, 207 Mass. 259, 264-265 (1911):

> "As to those matters it is plain, we think, that *it was within the discretion of the judge to grant or refuse the motion.*" (Italics supplied.)

State v. *Naething*, 318 Mo. 531, 539-540 (1927):

"We can see no reason why appellant should not have been accorded this privilege under such safeguards as the trial court thought necessary in order to guard against any possible substitution or trickery. Appellant cites numerous cases under paragraph 2 of his brief, which our Reporter will append. They fully support appellant's right to such an inspection. No cases from this State are cited, but precedent of our own is scarcely necessary because *the granting of such a request accords so thoroughly with our sense of what is fair and just to one accused of crime.*" (Italics supplied.)

State v. *Tippett*, 317 Mo. 319, 326-27 (1927):

"The prosecuting attorney is both an officer of the State and of the court, and his duty extends no further than an impartial, fair and just trial of defendant. If Tucker's statement comprised the truth, it would have availed defendant nothing in the inspection of it. If in any manner it tended to show that defendant was not guilty of the offense charged, he was entitled to the benefit of it. That it was desired that the State's evidence remain undisclosed, partakes of the nature of a game rather than judicial procedure. *The State in its might and power ought to be and is too jealous of according a defendant a fair and impartial trial to hinder him in intelligently preparing his defense and in availing himself of all competent material and relevant evidence that tends to throw light on the subject-matter on trial.*" (Italics supplied.)

Hameyer v. *State*, 148 Neb. 798, 802-803 (1947):

"* * * This section of the statute was applied * * * to procedure in criminal actions but an examination of its history discloses that it has no proper application in such actions, but applies only in civil actions. * * *

"This is not to say, however, that a like rule of procedure is not applicable to criminal proceedings. In *Cramer* v. *State* * * *, this court, *independent of statute*, said: 'If a prosecution is based upon the correctness or incorrectness of certain records * * *, the examination of such records by the defendant should be granted.' *This rule is* reasonable but *discretionary and should be enforced when the ends of justice require it.*" (Italics supplied.)

Cramer v. *State*, 145 Neb. 88, 95 (1944):

"In the administration of these rules *the trial court has a broad judicial discretion* and it is only when such discretion is abused that error can be based thereon." (Italics supplied.)

Matter of Hughes v. *Kings County Court*, 181 N. Y. Misc. 668, 673 (1943):

"There is no good reason why in a proper case, in the exercise of a sound discretion, the courts of criminal jurisdiction should not be permitted to make available to a defendant before trial, by discovery and inspection, legal evidence in the possession of the district attorney. The primary object of the criminal court is to render substantial justice and not to obtain a conviction. If there is anything about the bullets and gun which would tend to show the innocence of the defendants, they should have an opportunity to inspect the same in advance of the trial and not depend upon the hurried examination which would be permitted upon the trial." (Italics supplied.)

People v. *Gatti*, 167 N. Y. Misc. 545, 552-553 (1938):

"In the absence of specific statutory procedure and practice or legal precedents to the contrary, *this class of motions for the relief of discovery and examination must be left, because of the conditions in these modern times and the variety of reasons arising often out of complex situations in criminal causes, to the*

sound judgment of the court in the light of all the circumstances and *according to a real sense of the justice of the cause*, as may appeal to the individual judge without attempting at this time to lay down a hard and fast rule in the matter."

* * * * *

"*The ultimate purpose of the administration of the criminal law is to do justice*, not blindly, but rather by means that are fair, and that will accomplish the purposes of the law for the protection of society. What part considerations of public policy play in these and similar cases must in a large measure depend upon the merits of the application disclosed by the moving papers, the good faith of the applicant and whether his *constitutional rights* are safe-guarded and protected, as well as those of the public." (Italics supplied.)

Matter of Attorney General of United States, 160 N. Y. Misc. 533, 536-537 (1936):

"Ample authority exists for the proposition that the courts are not limited to applications by *defendants* to exercise the inherent power to permit inspections of grand jury minutes.

* * * * *

"*In the proper exercise of a sound discretion the power inherent in the court to grant the application should be exercised.*" (Italics supplied.)

People v. *Rogas*, 158 N. Y. Misc. 567, 570 (1936):

"The proposed inspection may be of incalculable benefit to the defendant. A right sense of justice seems to decree that this is a proper occasion for the exercise by the court of its discretionary power. The motion is granted."

People v. *Wargo*, 149 N. Y. Misc. 461, 464 (1933):

"*The court is under a duty to compel the production*

of competent documents at the very moment they are called for by counsel for the defendant when the circumstances of the case make them presently important. (*People* v. *Miller*, 257 N. Y. 54, at p. 59.)

"The following circumstances make the letters in question presently important at this time in order that the defendant may properly prepare for trial expert evidence as to their authenticity." (Italics supplied.)

People v. *Kresel*, 142 N. Y. Misc. 88, 89-91 (1931):

"In reference to the ground first above stated, the defendant makes an argument which, if this court is not otherwise concluded by authority, is one that appeals to the court as sound in basis. That is, the argument that *the People of the State are not seeking victims but criminals, and* that *each person accused of crime should be given the benefit of every reasonable opportunity to prepare for his defense and to prove his innocence.* (*People* v. *Bellows*, 1 How. Pr. [N. S.] 149; *Daly* v. *Dimock*, 55 Conn. 579.)"

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"Counsel for both sides cite *People ex rel. Lemon* v. *Supreme Court of the State of New York* (245 N. Y. 24), as authority for the disposition of this application, the defense claiming that the opinion in such case gives a basis for its application, and the People contending that such opinion gives ample reason to deny the application herein. * * * The reasoning followed by the learned chief judge in his opinion on the question at point here is such as to incline this court to believe that in a case where evidential matter is in the hands of the People and is needed by a defendant to afford him a fair trial, the court would grant an application to inspect such evidential matter. This conclusion is reinforced by the comment of the learned Court of Appeals in *People* v. *Miller* (257 N. Y. 54), on the failure of a district attorney to produce for the use of the defendants grand jury minutes used as the

basis for the cross-examination of a witness. *If we reach the conclusion that evidential matter should be made available on trial, this leads to the further conclusion that, in a case similar to the one here, where the matter sought is of great volume and intricacy, that such matter should be furnished by the People for inspection by the defendant's counsel before trial so as to avoid delay during the trial.*" (Italics supplied.)

People v. *Radeloff*, 140 N. Y. Misc. 690 (1931):

"I can see no reason why defendant should not be furnished with these documents, especially since he claims that the copies are not in his possession, and form the subject of this charge. * * *

"Motion granted."

People v. *Bellows*, 1 How. Pr. N. S. 149, 151 (N. Y. O. & T., 1884):

"The defendant should be advised of the accusation against him, with sufficient certainty to enable him to prepare for his defense. There is no good reason why such a requirement should not be enforced. *Each person accused of crime should be given the benefit of every reasonable opportunity to prepare for his defense, and to prove his innocence. The law is not seeking victims, but criminals, and every man until he is proved to be guilty is presumed to be innocent.* If, for example, a person is charged with appropriating a check belonging to another, and its proceeds, and desires it, a copy of the check should be given to him." (Italics supplied.)

State v. *Circuit Court of Minnehaha County*, 60 S. D. 115, 118, 119, (1932):

"The learned assistant attorney general contends, first, that the court is without power to compel an inspection. The contention is made that no such

power existed at common law, and that our statute * * * cannot be made applicable to criminal cases * * *."

* * * * *

"We are of the opinion that the power exists. It exists either by virtue of statute, *or by virtue of an inherent power within the court to compel an inspection in furtherance of justice,* or by virtue of a 'process of analogy' to the civil statute, thereby making the procedure in civil and criminal actions uniform to the extent permitted by the Constitution. Conceding that our statutes strictly construed are not sufficient to authorize the power in a criminal proceeding, nevertheless, we believe that the development of the procedure, since the enactment of the first of the civil statutes upon which our civil statute is based sustains our conclusion that *the power exists either by virtue of now being inherent in the court or by virtue of a process of analogy to the civil procedure,* which has made the practice of allowing an inspection of documents a part of the substance of the procedural system of the state." (Italics supplied.)

State v. *Morrison,* 175 Wash. 656, 658 (1933):

"It is urged that the trial court erred in its refusal to permit inspection of certain writings and documents in possession of the prosecuting attorney which had been considered by the grand jury. * * * Even now appellant fails to point out anything prejudicial which resulted, and we have been unable to learn from the record of any prejudice actually suffered by reason of the trial court's ruling. It is a settled law of this state that *such matters are peculiarly within the discretion of the trial court,* and that we can interfere only when there has been a manifest abuse of discretion." (Italics supplied.)